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Supreme Court, U.S.
FILED

No. 081211 MAR 27 2009

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In The

Supreme Court of the United States

CHURCH HOMES, INC.,
CONGREGATIONAL d/b/a AVERY HEIGHTS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since this Court's 1938 opinion in *N.L.R.B. v. Mackay Radio & Telegraph Co.*, employers have been free, consistent with the National Labor Relations Act, to permanently replace employees who are engaged in an economic strike. This right is generally unfettered and has only one narrow restriction. In 1964, the National Labor Relations Board (the "Board") held that employers may not exercise this right for an "independent unlawful purpose." *Hot Shoppes, Inc.*, 146 N.L.R.B. 802 (1964). Until this case, the Board has never found an employer to have had such a motive. In this case, although employers are not required to notify a union of their hiring plans, the Court of Appeals for the Second Circuit held that the mere fact that the employer did not affirmatively give the union advance notice that it was hiring permanent replacements established that the employer had an independent unlawful motive. As the Board itself observed, the decision of the Court of Appeals effectively relieved the General Counsel of his burden of proof. Such a decision is unreasonable and arbitrary given the record in this case and presents the following questions:

1. Did the Board unlawfully shift the burden of proof from the General Counsel by holding that it would find Respondent acted for an independent unlawful purpose unless Respondent proved that it had a legitimate reason for not disclosing its hiring plans to the Union?

QUESTIONS PRESENTED – Continued

2. Did the Board err when it disregarded as hearsay the testimony of Dr. Miriam Parker as to why Respondent did not inform the union of its staffing plans and required Respondent to produce actual evidence of the Union's potential for disruption?
3. Did the Board err, in light of the record, when it found that Respondent hired permanent replacements for an independent unlawful purpose?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are Petitioner Church Homes, Inc., Congregational d/b/a Avery Heights and Respondent the National Labor Relations Board. In addition, the New England Health Care Employees Union, District 1199, AFL-CIO, which represents certain employees of Church Homes, Inc., participated in the underlying appeal as an intervenor.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Church Homes, Inc., Congregational hereby states that it is a Connecticut non-stock corporation and is qualified as a not-for-profit corporation under Internal Revenue Code Section 501(c)(3). Petitioner has no parent corporation nor is there any publicly held corporation that holds ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks the Court to issue a writ of certiorari to review the final judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

Following an economic strike, Intervenor New England Health Care Employees Union District 1199 (herein Union) filed a charge with Respondent National Labor Relations Board (herein "the Board") claiming that Petitioner Church Homes, Inc. d/b/a Avery Heights (herein "Avery") engaged in certain unfair labor practices. The Board issued a complaint and rendered its original Decision and Order on December 16, 2004, which is reported at 343 N.L.R.B. 1301, and reprinted in the Appendix at App. 43-190. The Union appealed. The Court of Appeals for the Second Circuit granted the Union's petition for review and remanded the case to the Board for further review. *New England Health Care Employees Union v. NLRB*, 448 F.3d 189 (2d Cir. 2006), which is reprinted in the Appendix at App. 24-42. The Board issued its Supplemental Decision and Order in this matter on June 29, 2007, which is reported at 350 N.L.R.B. 214, and which is reprinted in the Appendix at App. 6-23. In its Supplemental Decision, the Board reversed itself and held that Avery had engaged in an unfair labor practice in violation of 29 U.S.C.

§ 158(a)(1) and (3). Avery then timely petitioned the Court of Appeals to review the Board's Supplemental Decision. The Board also cross-petitioned for enforcement of the Board's Supplemental Order. On December 29, 2008, the Court of Appeals denied Avery's petition and granted the Board's cross-petition for enforcement, which is unofficially reported at 2008 U.S. App. LEXIS 26600, and which is reprinted in the Appendix at App. 1-5.

STATEMENT OF JURISDICTION

The Court of Appeals had jurisdiction under 29 U.S.C. § 160(f) and issued a final judgment on December 29, 2008. This petition is timely filed under Supreme Court Rule 13(1), and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158 Unfair Labor Practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:

Provided further, that no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated

for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

29 U.S.C. § 160 Prevention of Unfair Labor Practices

* * *

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced in writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a

violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional

evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court

of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE

Introduction

Located in Hartford, Connecticut, Petitioner Church Homes, Inc. d/b/a Avery Heights (herein "Avery") is home to approximately 500 older adults, some of whom require nursing assistance. *Church Homes I*, 343 N.L.R.B. 1301, 1316 (App. 45, 106). For purposes of collective bargaining, the New England Health Care Employees Union, District 1199 AFL-CIO

(herein the "Union") represents the service and maintenance employees at Avery. *Id.* at 1301. (App. 45, 107). Over the years, Avery and the Union have negotiated several collective bargaining agreements.

During the 1995 negotiations, the Union demanded that Avery meet its "pattern" terms and conditions, while Avery fought to get off the pattern. As a result, the Union engaged in an economic strike for approximately five weeks. 343 N.L.R.B. at 1318 (App. 108). Ultimately, much to the Union's disappointment, a settlement was reached in December 1995 and the Union signed a four-year contract that was off the Union's pattern. *Id.* (App. 108); Tr.¹ at pp. 70, 181-183 (App. 196-197, 201-205). As Union President Jerome Brown explained the deal, Avery "broke the pattern in substantial ways in 1995." Tr. at pp. 70, 181-183. *Id.*

As 1999 approached, the Union intended to get Avery back on the pattern. In 1998, a year before Avery's labor contract even expired, Union President Brown warned Thomas Cloherty, Avery's labor attorney: "You know, it'll be different this time, the economy's different. It'll be harder to get people to come to work or come back to work." Tr. at p. 905 (App. 223-224).

There was never any allegation in this case that Avery bargained in bad faith. 343 N.L.R.B. at 1319

¹ Transcript of hearing before Administrative Law Judge, hereinafter "Tr."

(App. 112). In September 1999, Avery and the Union began negotiations for a new collective bargaining agreement and met numerous times prior to the strike. 343 N.L.R.B. at 1318-1319 (App. 111-112). At each of those meetings, the Union's unyielding position was repeatedly and clearly set forth: Avery must accept the Union's "pattern" or face a long economic strike. Tr. at pp. 910, 916, 920, 924, 926 (App. 225, 226-230).

Avery refused the Union's demands and a strike began on November 17, 1999. 343 N.L.R.B. at 1305, 1318 (App. 59, 111). During the first few weeks of the strike, Avery staffed the facility with a combination of non-bargaining unit employees performing mandatory twelve-hour shifts five or six days per week, volunteers, and temporary replacement workers. 343 N.L.R.B. at 1305 (App. 59); Tr. at pp. 1057-1064 (App. 223-241).

With regard to temporary employees, Avery used employees from agencies and workers hired directly on a temporary basis. Tr. at pp. 1057-1064 (App. 232-241). Not only were temporary employees costly, they were not as efficient as permanent employees, required more supervision, and, with high turnover, did not offer continuity of care to the residents. Tr. at pp. 1060-1064 (App. 235-241).

Volunteers were an "ephemeral" and limited staffing resource. Tr. at p. 1061 (App. 236-237). With limited training and many other activities in their lives, volunteers were not a steady and reliable source of workers. *Id.*

This temporary system of covering for the employees on strike was just that – a temporary system. By the end of November and the beginning of December, Avery began being concerned about the efficacy of these temporary arrangements. Tr. at pp. 1066, 1198-1204 (App. 242-243, 255-263).

Despite the strike, neither side made much movement in their positions during negotiations. Around December 2, 1999, Mr. Brown again warned Mr. Cloherty:

You know, this isn't going to be like the last time when people came back to work. . . . This is going to be a long strike. It'll go to New Year's and well beyond.

Tr. at p. 930 (App. 230-232); *see also* Tr. at p. 209 (App. 210-211). As Mr. Brown explained:

[W]e expected that the strike would last a while if the positions didn't change. And we expected that because the workers were out and they were determined, and I was trying to convey to him the mood of the employees who were really outraged at the fact that they were significantly behind other workers, and outraged that the proposals, that if I wanted to settle the strike on the conditions that Church Homes had offered, I would not have been able to have the members vote for it. I mean I was trying to convey that to him, that they were really a determined group of people here who felt that their conditions needed improvement, substantially, and that

this would go on if there were no change in either parties' position.

Tr. at pp. 101-102 (App. 197-200).

Reasonably believing that the strike would be lengthy unless it capitulated to the Union's demands, Avery began exploring the possibility of hiring permanent replacements in December. Tr. at pp. 1064-1065, 1193 (App. 240-242, 252-253). By the middle of the month, Avery had decided to change its staffing and to hire permanent replacements. 343 N.L.R.B. at 1305 (App. 59). Although it was anxious to have a stable workforce, Avery was nevertheless selective in the people it hired and did not hire all the people who were referred by the agencies. Tr. at pp. 267-275, 1067 (App. 212-222, 243-244).

Avery did not announce to the Union that it was planning to permanently replace striking workers. 343 N.L.R.B. at 1305, 1327 (App. 59, 151). Based on the Union's statements, Avery officials testified that they did not believe that such information would cause the Union to abandon the strike or even cause the return of a significant number of strikers. Tr. at pp. 101-102, 1066, 1143, 1205-1212 (App. 197-200, 242-243, 250-251, 263-272).

In addition, Dr. Miriam Parker, Avery's Administrator, testified that she believed that, if notified, the Union would interfere with Avery's ability to recruit replacement workers, and thus jeopardize Avery's ability to withstand the strike. Tr. at pp. 1068-1069 (App. 244-247). Dr. Parker testified that in the first

month of the strike, she received numerous reports of violence and intimidation attributed to the Union. Tr. at pp. 1068-1069. *Id.* These included reports of rocks being thrown at vehicles; eggs being thrown at vehicles and at least one temporary employee; a Union organizer spitting in a social worker's face; a Union organizer threatening a supervisor and the supervisor's daughter, telling the supervisor: "I know where you live. I've seen your daughter. I know what time she gets there;" slashing tires; and vandalism of the offices of a provider of temporary employees by Union Vice President Almena Thompson and some 40 other Union members. Tr. at pp. 1069-1071, 1164 (App. 245-249, 251-252). In the face of these reports, Avery believed that the Union would likely try to interfere and make hiring permanent replacements significantly more difficult if the Union was told of the plan. Tr. at pp. 1068-1070 (App. 244-248). As Union President Brown acknowledged, a major purpose in any strike is to discourage replacement workers of any kind and to make it more difficult for the employer to recruit and retain replacements. Tr. at pp. 200-204 (App. 205-210).

While Avery did not announce its staffing plans to the Union in advance, on January 3, 2000, in response to an inquiry of the Union, Avery did inform the Union that over 100 permanent replacement employees had been hired. 343 N.L.R.B. at 1305, 1319 (App. 60, 113). Despite the fact that Avery was still in the midst of recruiting replacement employees and had numerous applications to be processed,

Avery voluntarily agreed to a moratorium on hiring permanent replacement employees. 343 N.L.R.B. at 1329 (App. 158-159). After striking for two more weeks, the Union made an unconditional offer to return to work and ended its strike on January 20, 2000. *Id.* Subsequently, strikers were recalled to vacant positions as they became available. *Id.* All strikers have been recalled, and the Union remains the representative of the employees at Avery.

ARGUMENT FOR GRANTING THE PETITION

Introduction

For nearly seventy years, employers have had the broad right to respond to a union's economic strike by hiring permanent replacement employees. *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). Moreover, employers have never been required to disclose their hiring plans in advance to the union. The Board has specifically held that advance notice was not required. 343 N.L.R.B. at 1306 (App. 65-66). As the Board recognized in this case, just as the right to strike is a powerful tool available to a union to force an employer to yield to its demands, the right to hire permanent replacement employees is a powerful economic response available to employers to withstand a union's strike. *Id.* at 1306-1307 (App. 65-71). In this case, the Board, on remand from the Court of Appeals, materially interfered with that right by basing its finding of an

independent unlawful motive *solely* on the fact Avery did not disclose its plans to the Union, which it had no duty to do. This case gives the Court the opportunity to clarify an employer's right to hire permanent replacement employees and to address what evidence the General Counsel of the National Labor Relations Board must produce to establish that an employer has hired permanent replacement employees for an independent unlawful purpose.

The only restriction on an employer's right to hire permanent replacement employees during an economic strike is that an employer may not hire replacement employees for an "independent unlawful purpose." *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964). What constitutes an independent unlawful purpose, however, has never been addressed by the Board or the courts. In *Hot Shoppes, Inc.*, in the face of the union's threatened strike, the employer specifically told its employees that if they went on strike, they would be permanently replaced. *Id.* at 803. Even before the strike, the employer began to process applications for permanent replacement employees. *Id.* Upon review of the employer's aggressive conduct, the Trial Examiner held that the employer had committed an unfair labor practice by hiring strike replacements because it acted pursuant to a "contrived scheme" designed "to penalize various of the strikers and to defeat their rights to reinstatement. . . ." *Id.* at 835. The Board disagreed, rejected the Trial Examiner's findings, and held that, absent an "independent unlawful purpose," employers have "a legal right to

replace economic strikers at will," and dismissed the complaint. *Id.* at 805.

Over the past forty years, neither the Board nor the courts have required an employer to justify its decision to hire permanent replacement employees:

We, however, disagree with the Trial Examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operations of his business. The Supreme Court's decision in *Mackay Radio & Telegraph Company*, and the cases thereafter, although referring to an employer's right to continue his business during the strike, state that *an employer has a legal right to replace economic strikers at will*. We construe these cases as holding that the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose . . .

. . . There are no cases in this Court that require a different conclusion. Indeed, as indicated above, in *Hot Shoppes, Inc.*, supra, the Board read *N.L.R.B. v. Mackay Radio & Telegraph Co.* [citation omitted] as holding that *the motive for hiring permanent replacements is irrelevant*.

Belknap, Inc. v. Hale, 463 U.S. 491, 504 n.8 (1983) (emphasis added) (internal citations omitted) (quoting *Hot Shoppes, Inc.*, 146 N.L.R.B. 802 (1964)). More recently, the Board affirmed its position on this issue in *Choctaw Maid Farms*, 308 N.L.R.B. 521, 528 (1992):

If striking employees are economic strikers, the law allows an employer to hire permanent replacements. What [an employer's] state of mind might be in exercising that right is irrelevant.

I. The Board Improperly Shifted the Burden of Proof to Avery.

As the prosecutorial arm of the Board, the General Counsel bears the burden of proving, by a preponderance of the evidence, that a respondent has violated the Act and committed an unfair labor practice. 29 U.S.C. § 160(c); see *N.L.R.B. v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 (1983) (General Counsel must prove the elements of an unfair labor practice). In this case, Avery had the right to hire permanent replacement employees for any reason unless the General Counsel proved by a preponderance of the evidence that Avery hired such employees for an unlawful purpose. In this case, upon remand from the Court of Appeals, the Board majority reluctantly accepted the Court of Appeals' decision which effectively relieved the General Counsel of his burden of proof and imposed a presumption of unlawfulness upon Avery.

The General Counsel attempted to prove that Avery had an independent unlawful motive for hiring permanent replacement employees by offering: (1) evidence that Avery misrepresented its hiring plans; (2) a memorandum from Church Homes' President to its Board; and (3) evidence that Avery chose not to tell the Union of its hiring plans. 343 N.L.R.B. at 1305-1308,

1333 (App. 61-66, 176-180). The Administrative Law Judge and the Board rejected the General Counsel's claim that Avery had made any misrepresentations. *Id.* at 1331 (App. 167-168). The Board also rejected the Administrative Law Judge's characterization of the memorandum of Church Homes' President, Norman Harper. *Id.* at 1307 (App. 62-63, 67-68). These issues were not challenged. Finally, the Board also declined to examine Avery's decision not to disclose its hiring plans because Avery had no duty to disclose its plans. *Id.* at 1306 (App. 63-34). Although agreeing that Avery did not have a *duty* to disclose its hiring plans, the Court of Appeals held that Avery's silence could still be evidence of an unlawful motive and remanded the matter to the Board for further consideration.

Upon remand, the Board construed the Court of Appeals' decision as mandating a finding that Avery unlawfully hired its replacement employees unless Avery proved a lawful reason for its nondisclosure. Never before has such a burden been placed on an employer. In its Supplemental Decision, a majority of the Board, expressly stated that they understood the Court of Appeals' decision to "effectively relieve[] the General Counsel of its burden of establishing unlawful motive and improperly shifted the burden of proof to the employer to establish that it acted with a lawful motive." *Church Homes II*, 350 N.L.R.B. 214, 215 n.6 (App. 12-13). The majority of the Board disagreed with such a holding, but felt they were bound to do so by the court's decision. *Id.* With that understanding, the Board focused only upon Avery's

decision not to disclose its hiring plans and ignored the rest of the record. Without commenting on the other record evidence that it had previously considered, the Board held that Avery had not sufficiently proven a lawful reason for its nondisclosure and concluded that Avery acted for an independent unlawful motive. In doing so, the Board ignored substantial evidence in the record and acted unreasonably and arbitrarily.

In particular, without any explanation, in its Supplemental Decision, the Board failed to consider the text of Mr. Harper's memorandum and its prior interpretation. Rather, the Board simply noted that Mr. Harper did not mention Avery's concerns about the Union disrupting its hiring plans in his memorandum and concluded that the memorandum "undercuts" Avery's position. 350 N.L.R.B. at 216 (App. 15). Not only is such a conclusion contradictory to the Board's prior interpretation, it is arbitrary and unreasonable given the language of the memorandum. The relevant inquiry is whether Mr. Harper's memorandum suggests that Avery sought to displace the Union as the bargaining representative of its employees. And it does not.

While the fact that Avery bargained with the Union in good faith at all times during the 1999 negotiations may not be dispositive of its motive in hiring replacement employees, it also is some evidence that Avery was not pursuing a course of conduct to displace the Union. This is especially true since none of Avery's proposals ever sought to challenge the longstanding union security clause in the

labor contract, and there was no evidence Avery encouraged employees to decertify and "oust" the Union. 343 N.L.R.B. at 1307 (App. 66-68). On remand, the Board simply held that lawful bargaining conduct was "insufficient to negate the court's inference of an independent unlawful purpose. . . ." 350 N.L.R.B. at 216 (App. 16). The Board's failure to recognize that this fact is inconsistent with a finding of unlawful motive, but is consistent with a lawful motive, and is unreasonable, especially when considered in light of the entire record.

It is also undisputed that Avery voluntarily agreed to stop hiring permanent replacements in January, several weeks before the Union made an unconditional offer to return to work. If Avery was truly set on displacing the Union, it would not have stopped hiring permanent replacements. If its goal was to eliminate the Union, Avery would have continued hiring replacements until it could no longer do so. Nevertheless, on remand, the Board held that this fact did not "establish the absence of an improper motive. . . ." 350 N.L.R.B. at 216 (App. 16-17). Again, the Board's failure to recognize that this fact is inconsistent with a finding of unlawful motive, but is consistent with a lawful motive, and is unreasonable, especially when considered in light of the entire record.

In sum, other than Avery's non-disclosure, there is absolutely *no* evidence that could suggest that Avery hired permanent replacement employees to displace the Union as the bargaining representative.

In contrast, the record does contain evidence, which taken as a whole, supports a finding that Avery had a genuine belief that if the Union learned of Avery's decision, the Union would disrupt Avery's hiring process and jeopardize Avery's ability to hire permanent replacement employees and to endure an indefinite strike. Therefore, the General Counsel did not satisfy its burden and there is no substantial evidence in the record that Avery acted for an independent unlawful reason.

On appeal, despite the express language of the Board majority, and without any justification, the Court of Appeals held that the Board placed the burden of proof on the General Counsel. 2008 U.S. App. LEXIS 26600 at *5-6. As a consequence, despite the other evidence in the record, the Court of Appeals approved the Board's finding that Avery had an independent unlawful motive due to its decision not to disclose its plans, which it had no duty to disclose. *But see* 29 U.S.C. § 160(e) and (f) (Board is to base its decisions on "substantial evidence on the record considered as a whole."). In presuming that Avery acted unlawfully and placing the burden of proof on Avery, the Board acted unreasonably and arbitrarily, and its order should not have been enforced.

II. The Board's Rejection of Evidence of Avery's Lawful Reason of Its Secrecy Was Unreasonable and Arbitrary.

Avery did offer undisputed evidence at the administrative hearing as to why it did not disclose its plans while it was recruiting replacement employees. The Board, however, compounded its error by refusing to consider evidence of Avery's Administrator's state of mind in deciding to maintain secrecy.

At the hearing, Dr. Parker explained that she did not disclose Avery's hiring plans in advance to the Union because she had heard reports of the Union engaging in violent and threatening conduct, which she believed could disrupt Avery's ability to hire replacements. Tr. at pp. 1068-1070 (App. 244-248). The Board, however, failed to examine Dr. Parker's undisputed testimony, mischaracterizing it as hearsay. Moreover, the Board failed to consider Union President Brown's concession that, as a general practice, the Union endeavors to make it difficult for employers to hire replacement workers. Tr. at pp. 200-204 (App. 205-210). Accordingly, the Board's conclusion that Avery failed to offer a lawful reason for its non-disclosure is unreasonable and arbitrary in light of the whole record.

In this case, after the Union was on strike for several weeks, and with the prospect of a lengthy strike, Dr. Parker, who was responsible for Avery's operations, first raised the subject of maintaining operations with permanent replacement employees.

Tr. at pp. 1066, 1196, 1249 (App. 242-243, 254-255, 272-273). As he testified, Mr. Harper was also interested in getting "stability to the organization by having a critical mass of employees." Tr. at p. 1283 (App. 273-274). Mr. Harper did not consider using permanent employees as a threat to the Union because he believed the Union would not let the workers "back for a long period of time." Tr. at p. 1284 (App. 275-276).

Dr. Parker testified that prior to hiring any permanent replacement employees, she had received reports of the Union engaging in violent and threatening conduct. Specifically, Dr. Parker testified that she had heard reports of:

[R]ocks thrown at vehicles, eggs thrown at [Avery's] vans and also thrown at a temporary employee at a nurse a temporary nurse in a commuter parking lot. One of [Avery's] social workers who was working as a driver was spit at in the face by a union organizer. One of [Avery's] supervisors while she was waiting to exit was told by a union organizer I know where you live. I've seen your daughter. I know what time she gets there. It was essentially a threat to her daughter. Tires were slashed. Vendors tires were slashed. . . .

. . . There was an incident that occurred on December 9th. A number of union members, strikers and Almena Thomson [Union Vice President], went to the office of Star Med who was one of [Avery's] providers [of nursing staff] just totally 40 people in mass went

to the office and essentially threatened her and vandalized the office of Star Med.

Tr. at pp. 1069-1070 (App. 245-248). Accordingly, Dr. Parker testified that she believed that if the Union had advanced notice of Avery's plans, the Union would have disrupted Avery's recruitment and, without a permanent workforce, Avery might not be able to weather the Union's strike. Tr. at pp. 1068-1070 (App. 244-248). Indeed, Union President Brown conceded as much during the hearing and stated that the Union's mission in a strike is to discourage replacement workers and make it difficult for the employer to recruit workers. Tr. at pp. 200-204 (App. 205-210). Accordingly, it was not material whether the Union actually engaged in such conduct, but whether Dr. Parker had a reasonable belief concerning possible disruption. The Board, however, mischaracterized Dr. Parker's testimony as hearsay and did not consider it.

The federal rules of evidence define hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801. Testimony is not "hearsay" if it is offered to show the context in which the parties had been acting, or to show a party's motive or intent for behavior. *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 134 (3d Cir. 1997); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1434 (10th Cir. 1993); *United States v. Oguns*, 921 F.2d 442, 448-449 (2d Cir. 1990). The statements offered by Avery that are at issue in this case were not offered to prove the actual truth of the Union's

conduct, but to show Avery's belief and motivation for not choosing to tell the Union of its plans to hire replacement employees. Accordingly, Dr. Parker's testimony should not have been dismissed as hearsay, but should have been given considerable weight.

This Court rejected a similar action by the Board over ten years ago in *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359 (1998). In that case, the Board needed to determine whether the employer had a "good faith doubt" as to employees' support of a union in order to permit the employer to poll employees. As part of its evidence, the employer presented testimony from a manager who was told that "the entire night shift did not want the Union." *Id.* The administrative law judge and the Board refused to credit the testimony because: "[the employee who made the report to the manager] did not testify and thus could not explain how he formed his opinion about the views of his fellow employees." *Id.* at 369. This Court, however, recognized

it is not the fact of disfavor that is at issue (the poll itself is meant to establish that), but rather the existence of a reasonable uncertainty on the part of the employer regarding that fact. On that issue, absent some reason for the employer to know that [the employee] had no basis for his information, or that [he] was lying, reason demands that the statement be given considerable weight.

Id. at 369-370.

Contrary to the Board's and the Court of Appeals' suggestion, it has never been Avery's burden to prove that the Union actually engaged in acts of violence or that the Union would have actually disrupted Avery's hiring plans if the Union was informed. Rather, at most, it was Avery's burden to show that it had a reasonable belief that the Union might have done so, such that its nondisclosure was not suggestive of an unlawful motive. It was the General Counsel's burden to show by a preponderance of the evidence that Avery did not have such a belief and that Avery acted in fact for an unlawful motive. Neither the General Counsel nor the Union offered any evidence to discredit Dr. Parker's belief or to suggest that Avery hired permanent replacements to remove the Union as the bargaining representative. For example, neither the Board nor the Union called Union Vice President Almena Thompson or anyone else to refute Dr. Parker's testimony. Indeed, counsel for the General Counsel did not even cross Dr. Parker as to why she did not give the Union advance notice of Avery's hiring plans. Counsel for the Union did cross Dr. Parker as to her concerns and she further elaborated that some of the incidents were on the picket line, but the others reportedly occurred at various locations:

Some were picket line incidents. Some were commuter lot incidents. Some incidents such as a woman's gas tank being filled with sugar and car engine or top being painted red those occurred at residences. So the incidents occurred in the picket line, in the commuter lot, at people's homes, people

being followed from work to their homes, people being followed from their homes to work. There were a variety of incidents of threatening behavior.

I believe there was one arrest of violence with one of our vendors that was reported to the police and an arrest was made.

Tr. at pp. 1208-1209, 1211-1212 (App. 267-272). Accordingly, the Board's rejection of Dr. Parker's testimony in its Supplemental Decision is unwarranted and unreasonable.

Given the fact that the Court of Appeals remanded the case back to the Board to consider whether Avery's failure to give advance notice to the Union was evidence of an unlawful motive, it was improper for the Board to summarily reject Dr. Parker's testimony as hearsay and not to consider Mr. Harper's testimony that he believed a "critical mass" of replacements was needed to operate for the long-term. Furthermore, the Board's failure to consider the entire record, including its prior evaluation of the evidence, and its improper dismissal of Dr. Parker's testimony, render the Board's Supplemental Decision defective as unreasonable and arbitrary.

III. The Board's Finding That Avery Hired Permanent Replacement Employees For an Independent Unlawful Purpose Is Unreasonable and Arbitrary.

Since 1938, employers have had a broad right to hire permanent replacement employees in response to

a union's economic strike. In 1964, the Board held that employers may generally exercise their right to hire permanent replacement employees at will, except that they may not do so for "an independent unlawful purpose." *Belknap*, 463 U.S. at 504 n.8; *Hot Shoppes*, 146 N.L.R.B. at 805. Over the past four decades since the *Hot Shoppes* decision, the Board, however, has never elaborated upon what constitutes an "independent unlawful purpose." Not only has the Board never before held that an employer has violated the Act by hiring permanent replacement employees for an independent unlawful purpose, the Board has never held that simply failing to disclose hiring plans can presumptively establish an independent unlawful motive.

Recently, in *Supervalu, Inc.*, 347 N.L.R.B. No. 37, 2006 NLRB LEXIS 244 (June 13, 2006), the employer permanently replaced most of the striking employees the day after the union went on strike. *Id.* at *4-7. Despite the fact that the employer acted immediately to replace most of its workforce by promoting part-time employees to full-time positions and hiring new employees, the Board held that the General Counsel had not shown that the employer had acted for an "independent unlawful purpose." *Id.* at *86-88.

As the Board has previously recognized in this case, during labor negotiations parties often engage in "economic warfare":

To win that battle, the Union deployed its strike weapon in the midst of bargaining

negotiations, with the hope of securing agreement on its terms for a new contract.

In essence, [Avery] had two options. It could either capitulate the Union's demands, or it could employ economic weapons of its own [including hiring permanent replacement employees.]

343 N.L.R.B. at 1307 (App. 69). Accordingly, the Board originally observed an important distinction "between seeking to prevail over the Union and seeking to oust the Union as bargaining representative." *Id.* (App. 66-67). The General Counsel and the Union argued that Avery hired permanent replacements to eliminate the Union. In reviewing the record, in its original decision, the Board properly found that Avery had acted to prevail over the Union in the labor dispute and not to eliminate the Union as the bargaining representative. In its Supplemental Decision, after shifting the burden of proof to Avery, but without any evidence that Avery had acted to eliminate the Union, as opposed to withstanding the strike, the Board unreasonably and arbitrarily reversed itself and concluded that Avery had violated the Act.

The Board must base its decisions on "substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e) and (f). In an attempt to prove an independent unlawful purpose, the General Counsel and the Union relied upon four pieces of evidence: (1) Norman Harper's alleged statement to Union President Jerome Brown concerning Avery's intentions

regarding permanent replacement employees; (2) Avery's failure to notify the Union before hiring permanent replacement employees; (3) Gayle McAllister's alleged statement to Scott Cohen concerning the secrecy of Avery's hiring; and (4) Harper's statements in his December 31, 1999 memorandum to the Church Homes Board of Directors. 343 N.L.R.B. at 1305-1308, 1333 (App. 61-69, 176-180).

As to the first piece of evidence, the Administrative Law Judge and the Board rejected the testimony of Union President Brown concerning his alleged conversation with Mr. Harper regarding Avery's intentions of hiring permanent replacements. Mr. Brown testified that Mr. Harper told him that Avery had no intention of hiring permanent replacements. 343 N.L.R.B. at 1330, 1331 (App. 163-168). Mr. Harper denied any such statement. *Id.* Upon review of the competing evidence, the Administrative Law Judge found Mr. Harper's denial more credible than Mr. Brown's statement and neither the General Counsel nor the Union took exception to this finding. *Id.* at 1331 (App. 167-168).

With respect to the three other pieces of evidence, the Board held that they, either separately or in any combination, did not establish an unlawful motive in hiring permanent replacement employees. 343 N.L.R.B. at 1306 (App. 63). The Board began its original analysis by reaffirming its long standing precedence that an employer is not obligated to inform a union of its plans to hire permanent replacement employees. *Id.*; *Armored Transfer Serv.*,

Inc., 287 N.L.R.B. 1244, 1251 n.21 (1988); *American Cyanamid Co.*, 235 N.L.R.B. 1316, 1323 (1978). Because Avery did not have an obligation to disclose to the Union its intentions to hire permanent replacements, the Board held that the fact that Avery did not inform the Union of its hiring plans and the fact that Cohen testified that a manager at Avery asked him to keep the hiring "hush-hush," did not prove an unlawful purpose. *Id.* at 1306 (App. 63-64).

As to the fourth piece of evidence the General Counsel and the Union relied upon in an attempt to prove an unlawful purpose, the Board closely examined Mr. Harper's December 31 memorandum and reasonably concluded that it did not demonstrate an unlawful purpose. On December 31, 1999 Mr. Harper wrote to members of Avery's Board of Directors stating in relevant part:

As a well-executed surprise event the day before Christmas, we began to permanently replace striking workers at Avery. These new employees have some distinct advantages: they are very pleased to have the job for the money that we currently pay; they have fine work ethics; they want to learn; they are less expensive than temporary workers; and they bring predictable stability for the future, when the strike is over, because they say they want to work here for a long time. So far, we have hired 104 permanent replacements at Avery, replacing 60% of those on strike. If Mr. Brown refuses to seriously negotiate in good faith, we plan to add one or

more permanent replacements each day. We have them in a real bind at Avery.

Id. at 1305, 1330 (App. 60, 161-163, 191-195). The Administrative Law Judge relied extensively on Mr. Harper's memorandum and referred to it as a "smoking gun." *Id.* at 1334 (App. 180). The Board, however, rejected the Administrative Law Judge's interpretation, found that "[t]he evidence is the case, including Harper's memorandum, simply does not establish some kind of nefarious scheme to punish striking employees by hiring permanent replacements," and concluded that the memorandum reflected Avery's desire to gain the advantage in the ongoing contract negotiations insofar as being able to withstand the strike in order to avoid capitulating to the Union's demands. *Id.* at 1307 (App. 66-69). As stated in the memo, and as the Board originally recognized: Avery was hiring permanent replacements because the Union "refuses to seriously negotiate in good faith. . . ." *Id.* Accordingly, by its express terms, the memorandum states that Avery sought to have the Union bargain in good faith, which is antithetical to an intent to displace the Union. As the Board originally recognized, and then ignored, because Avery was able to hire a significant complement of permanent replacement workers, its ability to endure an indefinite strike was enhanced. Consequently, Avery had placed the Union in a "real bind," which was not unlawful. *Id.* Neither the Union nor the General Counsel challenged the Board's interpretation of Mr. Harper's memorandum.

Although Mr. Harper's December 31 memorandum did not discuss a concern of violence, it also did not discuss any desire to eliminate the Union. Rather, it stated that if the Union "refuses to seriously negotiate in good faith" Avery would continue to hire permanent replacements. 343 N.L.R.B. at 1305, 1330 (App. 60, 161-163, 191-195). Accordingly, the memorandum reflected Avery's desire to have the Union move off its demand for a pattern contract so that a new contract could be reached. As the Board previously held, the "bind" in which Avery had the Union, was the fact that it would be able to sustain the strike with a permanent workforce, which is not an unlawful purpose. *Id.* at 1307 (App. 66-69).

As Mr. Harper testified, he did not intend to use the hiring of permanent replacements as a "threat" or a "negotiating lever", but as a means to maintain quality operations at Avery over an extended period during the strike. Tr. at pp. 1284-1286 (App. 275-278). Both Mr. Harper and Dr. Parker testified that in response to the Union's repeated threats that the strike would be much longer than the 1995 strike Avery began to hire permanent replacement employees so that it could operate for the long-term in a cost efficient and quality manner. Tr. at pp. 101-102, 209, 930, 1058, 1066, 1143, 1198-1204 (App. 197-200, 230-234, 242-243, 250-251, 255-262). Dr. Parker offered detailed testimony regarding the means Avery used during the initial weeks of the strike and why those methods were not effective over an extended period.

Id. The Board specifically recognized that such a motive is lawful:

... hiring strike replacements enhances the employer's position ... the employer can operate during the strike and can thus "hold out" longer than the strikers ...

343 N.L.R.B. at 1306 (App. 64). Moreover, the Board, as the agency primarily responsible for labor policy, held that in an economic strike, an employer's desire to break the Union's solidarity is also not an unlawful objective. 343 N.L.R.B. at 1307 (App. 66-69).

In its Supplemental Decision, the Board ignored its prior rejection of the General Counsel's evidence and improperly held that Avery violated the Act simply by not disclosing its hiring plans in advance. As such, in light of the record, the Board's Supplemental Decision and Order is unreasonable and arbitrary. The record does not support a finding that the General Counsel has proven that Avery hired permanent replacements for an unlawful purpose. Accordingly, this Court should reverse the Court of Appeals' decision and direct the court to vacate the Board's Supplemental Decision and Order and direct the Board either to dismiss the charge against Avery or to review all of the evidence in the record, including Dr. Parker's testimony.

CONCLUSION

For the above reasons, Avery respectfully submits that in its Supplemental Decision the Board improperly shifted the burden of proof to Avery to disprove that it had not violated the Act and that its finding that Avery exercised its right to hire permanent replacement employees for an independent unlawful motive was irrational and unwarranted. Therefore, this Court should grant Avery's Petition for Certiorari.

Respectfully submitted,

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Attorney for Petitioner

Dated: March 27, 2009

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**CHURCH HOMES, INC, d/b/a AVERY HEIGHTS,
Petitioner-Cross-Respondent,**

-v-

**NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner,
NEW ENGLAND HEALTH CARE
EMPLOYEES UNION, DISTRICT 1199, SEIU,
Intervenor.**

07-3100-ag, 07-3617-ag

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

2008 U.S. App. LEXIS 26600

December 29, 2008, Decided

COUNSEL: Appearing for Petitioner-Cross-Respondent:
Michael C. Harrington, Murtha Cullin LLP, Hartford,
CT.

Appearing for Respondent-Cross-Petitioner: Ruth E.
Burdick, Attorney (Robert L. Englehart, Supervisory
Attorney, on the brief), National Labor Relations
Board, Washington, D.C.

Appearing for Intervenor: John M. Creane, Esq.
(Kevin A. Creane, Esq., on the brief), Milford, CT.

JUDGES: Present PIERRE N. LEVAL, ROSEMARY
S. POOLER, and BARRINGTON D. PARKER, Circuit
Judges.

OPINION

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the NLRB's petition for enforcement is **GRANTED** and Church Homes, Inc., d/b/a Avery Heights's petition for review is **DENIED**.

Church Homes, Inc. d/b/a Avery Heights ("Avery") petitions for review of the National Labor Relations Board's ("the Board") Supplemental Decision and Order finding that Avery, in hiring permanent replacements and refusing to reinstate the striking workers upon their unconditional offer to return to work, violated Section 8(a)(1) and (3) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1) and (3). The General Counsel of the NLRB brings a cross-application for enforcement of the Board's Order, and the New England Healthcare Employees Union ("Union") intervenes in support of enforcement. We assume the parties' familiarity with the facts, the proceedings below, and the issues on appeal.

In *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 193-195 (2d Cir. 2006) [*Church Homes I*], we granted the Union's petition for review of the Board's initial decision dismissing the complaint against Avery and remanded to the Board. *Id.* We acknowledged that hiring permanent replacement workers in response to a strike is permissible unless the employer acts with "an independent unlawful purpose." *Id.* at 192 (internal quotation

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marks omitted). We found, where the evidence was undisputed that Avery had conducted its hiring of permanent replacements in secret, that it was "unwarranted" for the Board to presume that "an employer's decision to keep the hiring of permanent replacements secret is not probative of whether the employer had an independent lawful purpose for the hiring." *Id.* at 195 (internal quotation marks omitted). The Board's error was apparent from its failure to recognize that an employer "with an illicit motive to break a union [would] have a strong incentive to keep the ongoing hiring of replacements secret." *Id.*

We concluded that the Board "failed to acknowledge the natural and logical implications of the facts it credited and the analytic framework it adopted," and erred by failing to consider whether the secrecy indicated an "independent unlawful motive" for hiring replacements. *Id.* at 196. The Board was directed to consider the implications of Avery's secrecy. But the Board was "not preclude[d] ... on remand from reaching the same conclusion [as it did in its initial decision] through adequate reasoning." *Id.* at 196. The Board was invited to consider additional evidence offered by Avery that might establish a legitimate explanation for hiring replacements in secret, and to revisit the administrative law judge's negative credibility finding with respect to an Avery supervisor's testimony that fear of violence was the reason for the secrecy. *Id.* at 196 n. 7.

We find that the Board complied with this Court's remand. The Board, finding "the record is

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insufficient to refute the inferred unlawful motive," held that Avery's secret hiring of permanent replacements demonstrated an independent unlawful purpose and that its refusal to reinstate the strikers was a violation of the Act. *Church Homes, Inc. d/b/a Avery Heights*, 350 N.L.R.B. No. 21, 2007 WL 1946623, at *5 (June 29, 2007). The Board appropriately recognized that the logical inference to be drawn from Avery's secrecy, absent evidence of a legitimate purpose or credible explanation for the secrecy, was that Avery intentionally concealed its hiring of permanent replacements to remove Union members from its workforce and thereby break up the Union. See *Church Homes I*, 448 F.3d at 195. The Board reasonably determined that neither Avery's assertion of good faith in bargaining nor its actions subsequent to the secret hiring of replacements effectively rebutted the inference that the secret hiring was illegitimate under the circumstances. There also was no error in the negative credibility finding as the record, especially the December 31, 1999 memorandum written by Avery's Chief Executive Officer, undercuts the rationale that fear of violence was the reason for the secret hiring. See *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) ("[T]he findings of the Board cannot be lightly overturned, especially when these findings are based upon the Board's assessment of credibility." (internal quotation marks omitted)).

Avery contends the Board improperly shifted the burden of proof onto it. In support of the argument, it cites a footnote in which members of the Board, who

concurred only reluctantly in the Board's disposition, asserted that our Court had shifted the burden and expressed disagreement with that action. In *Church Homes I*, we did not shift the burden to the employer. We rather ruled that Avery's secrecy, unless rebutted, supported an inference of an independent unlawful purpose through which the General Counsel could carry the burden of proving violation of the Act. 448 F.3d at 195-96. As we understand the Board's opinion, it correctly placed the burden of proving a violation of the Act on the General Counsel. Member Walsh noted in the same footnote that Avery's secrecy "is probative of whether the decision to replace the strikers was motivated by an independent unlawful purpose." *Church Homes, Inc. d/b/a Avery Heights*, 350 NLRB No. 21, 2007 WL 1946623, at *3 n.6 (June 29, 2007). The Board found that the General Counsel sustained his burden of proving Avery's violation by putting forth evidence of Avery's secrecy which, when inadequately rebutted by Avery, supported an inference of independent unlawful purpose.

For the foregoing reasons, we **GRANT** the General Counsel of the NLRB's petition for enforcement and **DENY** Avery's petition for review.

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Church Homes, Inc. d/b/a Avery Heights and New
England Health Care Employees Union, District
1199, Service Employees International Union¹

Case 34-CA-9168

NATIONAL LABOR RELATIONS BOARD

*350 N.L.R.B. 214; 2007 NLRB LEXIS 253;
182 L.R.R.M. 1136; 2006-7 NLRB Dec.
(CCH) P17,364; 350 NLRB No. 21*

June 29, 2007

JUDGES: By Robert J. Battista, Chairman; Peter
C. Schaumber, Member; Dennis P. Walsh, Member

OPINION:

SUPPLEMENTAL DECISION AND ORDER

On December 16, 2004, the National Labor Relations Board issued its Decision and Order in this proceeding finding, among other things, that the Respondent did not unlawfully fail to reinstate permanently replaced economic strikers upon their unconditional offer to return to work, because there was no showing that the Respondent had an independent unlawful motive in hiring the permanent replacements.² The

¹ We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL-CIO effective July 25, 2005.

² 343 NLRB 1301 (2004). Member Walsh, dissenting in part, found that the General Counsel had proved unlawful motive, and thus that the Respondent violated Sec. 8(a)(3) and (1) of the

(Continued on following page)

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Union³ filed with the United States Court of Appeals for the Second Circuit a petition for review of the Board's Order insofar as it dismissed that allegation.

On April 19, 2006, the court granted the Union's petition for review, vacated the Board's decision, and remanded the case to the Board for further proceedings consistent with the court's opinion.⁴

By letter dated September 19, 2006, the Board notified the parties that it had decided to accept the court's remand and invited them to file statements of position with respect to the issues raised by the court's opinion. The Respondent, the General Counsel, and the Union each filed a statement of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have reviewed the entire record in light of the court's remand, which constitutes the law of the case. We find, based on that remand, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate the permanently replaced economic strikers upon their unconditional offer to return to work.

Act by failing to reinstate the permanently replaced strikers upon their unconditional offer to return to work.

³ *New England Health Care Employees Union, District 1199, Service Employees International Union.*

⁴ *New England Health Care Employees Union, District 1199, SEW v. NLRB*, 448 F.3d 189 (2d Cir. 2006).

Background

The pertinent facts are as follows. During negotiations for a successor contract, the Union commenced an economic strike on November 17, 1999. Virtually all of the approximately 180 unit employees participated in the strike.

On about December 15, 1999, the Respondent began hiring permanent replacements for the striking employees. As found by the court, the Respondent "made a conscious decision to tell the Union nothing about the hiring of permanent replacements" and "took active measures to keep the replacement campaign a secret while hiring as many permanent workers as it could before the Union caught on." *New England Health Care Employees Union, District 1199, SEIU v. NLRB, supra* at 190.

The Union learned about the Respondent's hiring of permanent replacements in late December. The Union then arranged for a meeting with the Respondent on January 3, 2000, during which the Respondent admitted having hired "over 100" permanent replacements for striking employees. *Id.*

On January 20, 2000, the Union made an unconditional offer to return to work on behalf of the strikers. In response, the Respondent began recalling strikers to the positions that it had not yet filled with permanent replacements, ultimately reinstating about 78 employees.

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The Union filed an unfair labor practice charge. The General Counsel issued a complaint, alleging that the Respondent had violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the economic strikers as of January 20.

The administrative law judge found the violation, concluding that the secret hiring of the permanent replacements was motivated by the desire to punish the strikers and break the Union's solidarity. The Board reversed the judge, finding that the General Counsel had failed to demonstrate that the Respondent acted with an independent unlawful purpose in hiring the permanent replacements. In particular, the Board found that the Respondent's failure to disclose the hiring of permanent replacements was not evidence of an illicit motive, inasmuch as the Respondent had no legal obligation to make that disclosure. *Avery Heights, supra* at 1306-1307.

The Decision of the Second Circuit Court of Appeals

On review, the court acknowledged the settled principle that an employer may hire permanent replacements for economic strikers and need not discharge those replacements if the strikers make an unconditional offer to return to work. *Supra* at 192. The court further held, however, that the Act is violated where "an independent unlawful purpose" motivated the hiring of permanent replacements." *Id.*, citing *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964).

The court found it unnecessary to determine whether there was such an unlawful purpose in this case. Instead, the court held that the Board erred in concluding that because an employer is not obligated to notify strikers before hiring permanent replacements, the Respondent's secrecy in hiring such replacements was not probative of an independent unlawful purpose. *Supra* at 195.

The court concluded that the Board's failure to consider the purpose behind the Respondent's secrecy was problematic because, in the court's view, the "natural and logical" implication of the facts the Board credited was that the Respondent's secrecy was illicitly motivated:

[L]ogic suggests that an employer seeking to enhance its bargaining leverage by hiring permanent replacements would have every incentive to publicize the effort, and that an employer seeking only to prolong its ability to withstand the strike would be indifferent to whether the strikers and the union knew what it was doing.

Conversely, it would appear that employers with an illicit motive to break a union have a strong incentive to keep the ongoing hiring of permanent replacements secret . . . [to gain] enough time to establish an employment relationship with a large number of permanent replacements *before* the union can react by offering to return to work[.] [*Supra* at 195-196 (emphasis in original).]

Given what the court determined were the logical implications of the Respondent's secrecy, and the Board's failure to consider the purpose of that secrecy, the court concluded that there was "no apparent basis for the Board's conclusion that 'the nondisclosure did not have an illicit motive.'" *Supra* at 196 (quoting 343 NLRB at 1307). The court accordingly granted the Union's petition for review and remanded the case to the Board.

In its remand, the court was careful to explain that it was not deciding whether the Respondent had an unlawful independent purpose for hiring permanent replacements. Thus, in remanding the case, the court observed that the Board might:

decline to accept the ALJ's negative credibility finding with respect to the evidence that [the Respondent] submitted suggesting that fear of picket line violence motivated its decision to keep secret the hiring of permanent replacements (provided the record supports such a reversal . . .).

Supra at 196 fn. 7.⁵ The court also cited additional evidence that the Respondent argued "might suggest that it did not possess an independent unlawful motive" in hiring the permanent replacements, including that the Respondent: (1) demonstrated an

⁵ The court stated that a fear of picket line violence, if proven, could constitute a legitimate explanation for the Respondent's secrecy. *Supra* at 195.

ongoing willingness to negotiate a contract with the Union; (2) agreed to a request by the mayor of Hartford that it stop hiring additional permanent replacements while his strike mediation efforts were ongoing (despite having unprocessed job applications); and (3) solicited the Union's input on how best to recall strikers who had not been permanently replaced to available positions, and then followed the Union's suggestions. *Supra* at 196 fn. 7.

Discussion

We have accepted the court's remand, and recognize – as the law of the case – the court's finding that the logical implication of the Respondent's secrecy was an illicit motive.⁶ Having reviewed the record,

⁶ The court did not explicitly place the burden of proof on the Respondent to establish a lawful motive for secrecy in the hiring of the replacements. However, the court did say that the "natural and logical" implication of the facts is that the secrecy was unlawfully motivated. The court also said that employers with an unlawful motive would do what the Respondent did here, i.e., keep secret the hiring of replacements. In view of these pronouncements, it would appear that the court placed on the Respondent the burden of establishing a lawful motive for maintaining secrecy in the hiring of replacements.

Chairman Battista and Member Schaumber respectfully disagree with the Second Circuit in this respect. The General Counsel bears the burden of proving by a preponderance of the evidence that an unfair labor practice has occurred, including proving unlawful motive. *Wright Line*, 251 NLRB 1083, 1088 fn. 11 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See Sec. 10(c) of the Act

(Continued on following page)

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including the facts highlighted by the court, we find that the record is insufficient to refute the inferred unlawful motive. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate the permanently replaced economic strikers upon their unconditional offer to return to work.

(violations may be found only "upon the preponderance of the testimony taken"). Although the court agreed with the Board that an employer has no duty to disclose to a union its intention to hire permanent replacements, *supra* at 195, the court's decision suggests that unlawful motive may be inferred solely from an employer's secrecy in hiring permanent replacements. In the view of Chairman Battista and Member Schaumber, that inference effectively relieves the General Counsel of the burden of establishing unlawful motive and improperly shifts the burden of proof to the employer to establish that it acted with a lawful motive.

Chairman Battista and Member Schaumber believe that there can be a number of valid reasons for secrecy. They agree that the employer is in the best position to present any such reasons, and thus they believe that the employer has the duty to go forward with any such reasons. However, they do not agree that the burden of persuasion shifts away from the General Counsel. Nevertheless, Chairman Battista and Member Schaumber recognize that they are bound by the court's opinion as the law of the case.

Contrary to his colleagues, Member Walsh fully agrees with the Second Circuit. As he stated in his original dissent, although the Respondent may not have had a duty to notify the Union before hiring permanent replacements, "the fact that [the Respondent] was willing to go to great lengths to conceal its intentions" is probative of whether "the decision to replace the strikers was motivated by an independent unlawful purpose." *Supra* at 1313 fn. 5.

The Respondent's Discredited Testimony Concerning Fear of Picket Line Violence

At the hearing before the administrative law judge, the Respondent's administrator, Dr. Miriam Parker, testified that she had heard of a number of incidents of strike-related violence. She testified that she kept secret the hiring of permanent replacements because she feared that the Union would engage in additional violence and other misconduct to impede the Respondent's efforts to recruit replacement employees. None of the Respondent's other management personnel so testified.

The judge discredited Parker's testimony based on his evaluation of her demeanor and the absence of evidence corroborating her claimed fear of violence. *See supra* at 1317,1333. The judge explained:

The only evidence in support of [Parker's] claim was hearsay. Although there was a police presence throughout the strike and videotape evidence of supposedly inappropriate conduct on the picket line, the record here is devoid of police reports, tapes, or any other evidence to show that the Respondent had a good faith concern that it would not be able to hire permanent replacements in sufficient numbers to continue operations if the Union was aware of its plans. [*Supra* at 1333.]

We affirmed this credibility determination in the underlying decision. On remand, we having carefully reviewed the record, and we reaffirm that finding as

consistent with the record as a whole. As found by the judge, Parker was not credible and the record is devoid of evidence that would lend credence to Parker's claim. Indeed, other record evidence undercuts her claim. Thus, in the December 31, 1999 confidential memorandum from the Respondent's chief executive officer, Norman Harper, to the Respondent's board of directors regarding the advantages of hiring permanent replacements, and the Respondent's plans to continue to do so, there was no mention of the Respondent's claimed fear of violence. Likewise, the owner of an agency that supplied replacement employees testified that when the Respondent instructed him that the hiring of replacements was to be kept "hush-hush," no mention was made of a fear of violence as the reason for that secrecy.

In sum, we reaffirm the judge's discrediting of Parker's testimony that the Respondent's secrecy was motivated by a fear of violence. *See Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951) (the Board does not overrule a judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect).

The Additional Evidence Cited by the Second Circuit

As noted above, the Respondent urged the court to consider the following evidence in support of its

claim that it had no unlawful motive in hiring the permanent replacements: (1) that it continued bargaining in good faith with the Union; (2) that it agreed to the Mayor of Hartford's request to stop hiring additional permanent replacements while he mediated the parties' labor dispute; and (3) that it solicited and followed the Union's advice on how best to recall strikers who had not been permanently replaced. *See supra* at 196 fn. 7. We find the Respondent's proffered evidence insufficient to refute the court's finding that the logical inference from the Respondent's secrecy was an illicit motive.

First, the Respondent's lawful conduct at the bargaining table is insufficient to negate the court's inference of an independent unlawful purpose behind the Respondent's secret hiring of permanent replacements. The Respondent's argument boils down to a suggestion that because it did not violate its duty to bargain under Section 8(a)(5), its unexplained secret hiring of permanent replacements could not have violated Section 8(a)(3). That argument fails as a matter of law and logic, and we reject it.

Similarly, the Respondent's agreement to a 10-day hiring moratorium while the Mayor of Hartford attempted to mediate the labor dispute is unavailing. The Respondent did not agree to the moratorium until almost 1 month *after* the Respondent commenced hiring permanent replacements and only after the Union had discovered that hiring and confronted the Respondent. By then, the Respondent had already permanently replaced more than half the

bargaining unit.⁷ In these circumstances, the Respondent's agreement to a brief moratorium cannot establish the absence of an improper motive with respect to its earlier hires.

Finally, the Respondent relies on the fact that, once the Union learned of the hiring and the strikers unconditionally offered to return to work, it solicited the Union's input on how best to recall strikers to available positions and followed the Union's suggestions. Again, although evidence of lawful behavior with respect to the recall, those discussions occurred well after the replacement hiring. That recall cooperation does not support, let alone establish, that the Respondent had a lawful motive for its earlier secret hiring of permanent replacements.

Conclusion

We have carefully reviewed the evidence, including that brought to our attention by the Second Circuit and the Respondent, and find that it fails to establish that the Respondent did not possess an unlawful motive for its secret hiring of permanent replacements. We accordingly conclude, under the terms of the court's remand, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to

⁷ The Respondent admitted to the Union at the January 3, 2000 meeting that it had hired over 100 permanent replacement employees; the bargaining unit comprised about 180 employees.

reinstate the permanently replaced economic strikers upon their unconditional offer to return to work.

ORDER

The National Labor Relations Board orders that the Respondent, Church Homes, Inc. d/b/a Avery Heights, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate any employees engaged in a strike, upon their unconditional offer to return to work, where it is shown that the Respondent was motivated by an independent unlawful purpose in hiring permanent replacements for the striking employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the employees who went on strike on November 17, 1999, and who have not yet been reinstated, full rein statement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if

necessary, any permanent replacements hired during the strike.

(b) Make whole the employees who went on strike on November 17, 1999, and who have not yet been rein stated, and the employees who may have been reinstated but whose reinstatement was delayed because a permanent replacement occupied their position on January 20, 2000, for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful failure to reinstate the striking employees, and within 3 days thereafter notify them in writing that this has been done and that the unlawful failure to reinstate them will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Hartford, Connecticut, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 20, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX:

**APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR
RELATIONS BOARD**

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to reinstate any employees engaged in a strike, upon their unconditional offer to return to work, where it is shown that we were motivated by an independent unlawful purpose in hiring permanent replacements for the striking employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer the employees who went on strike

on November 17, 1999, and who have not yet been reinstated, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary any permanent replacements hired during the strike.

WE WILL make whole the employees who went on strike on November 17, 1999, and who have not yet been reinstated, and the employees who may have been reinstated but whose reinstatement was delayed because a permanent replacement occupied their position on January 20, 2000, for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful failure to reinstate the striking employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful failure to reinstate will not be used against them in any way.

CHURCH HOMES, INC. D/B/A AVERY HEIGHTS

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law
Collective Bargaining & Labor Relations
Strikes & Work Stoppages
Labor & Employment Law
Collective Bargaining Labor Relations
Unfair Labor Practices
Strikes
Labor & Employment Law
Wrongful Termination
Remedies
Reinstatement

**NEW ENGLAND HEALTH CARE EMPLOYEES
UNION, DISTRICT 1199, SEIU, AFL-CIO,
Petitioner, -v.- NATIONAL LABOR RELATIONS
BOARD, Respondent, CHURCH HOMES, INC.,
d/b/a AVERY HEIGHTS, Intervenor.**

Docket No. 05-0181-ag

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**448 F.3d 189; 2006 U.S. App. LEXIS 9939;
179 L.R.R.M. 2577; 152 Lab. Cas. (CCH) P10,645**

**December 21, 2005, Argued
April 19, 2006, Decided**

COUNSEL: JOHN M. CREANE, Law Firm of John M. Creane, Milford, CT, for Petitioner.

AILEEN A. ARMSTRONG, Deputy Associate General Counsel (Robert J. Englehart, Supervisory Attorney, Steven B. Goldstein, Attorney, Arthur F. Rosenfeld, Acting General Counsel, John E. Higgins, Jr., Deputy General Counsel, Margery E. Lieber, Acting Associate General Counsel, on the brief), National Labor Relations Board, Washington, DC, for Respondent.

MICHAEL C. HARRINGTON, Murtha Cullina LLP, Hartford, CT, for Intervenor.

JUDGES: Before: JACOBS, LEVAL, STRAUB, Circuit Judges.

OPINION BY: Dennis G. Jacobs

OPINION

DENNIS JACOBS, Circuit Judge:

The New England Health Care Employees Union ("Union") petitions for review of so much of the decision of the National Labor Relations Board ("Board") as dismissed the complaint alleging that Church Homes, Inc., d/b/a Avery Heights ("Avery"), violated §§ 8(a)(1) and (3) of the National Labor Relations Act ("Act"), 29 U.S.C. §§ 158(a)(1) and (3), when it failed to reinstate all strikers upon their unconditional offer to return to work. Avery refused to reinstate the strikers on the ground that it had hired permanent replacements – a measure that an employer is free to take in order to withstand or end a strike. The Administrative Law Judge ("ALJ") found, however, that Avery had an independent unlawful motive for hiring permanent replacements for the striking workers – to break the Union – and that its refusal to reinstate therefore violated the Act. The Board reversed on the ground that the Board General Counsel ("General Counsel"), who represented the Union (the Charging Party) before the ALJ, *see* 29 U.S.C. § 153(d), had failed to demonstrate that Avery had an independent unlawful motive for hiring the permanent replacements. We conclude that the Board's determination was based on arbitrary and capricious reasoning, and therefore grant the Union's petition.

Background

Avery is a combined nursing home/assisted living facility for approximately 500 adults. The Union has been the certified bargaining representative for all service and maintenance employees at Avery since the early 1970s. Approximately 180 to 185 of the Union's members began an economic strike on November 17, 1999, after Avery and the Union were unable to agree on a new contract. Initially, Avery carried on operations by relying on nonstriking employees, managers, temporary employees, and volunteers. The evidence shows that Avery officials were satisfied at first with the continuity and quality of patient care and with worker morale, but became concerned about their ability to sustain patient care as long hours and stressful conditions continued. On December 2, the Union President warned Avery's chief negotiator that, unless compromises were made, the strike was going to be a long one.

On or about December 15, 1999, Avery began hiring permanent replacements, both directly and through outside agencies charging substantial fees. Avery paid the permanent replacements an hourly wage that was higher than it was offering the strikers, but less than it was paying its temporary workers and less than what the Union was demanding at the bargaining table.

Avery made a conscious decision to tell the Union nothing about the hiring of permanent replacements, and took active measures to keep the replacement

campaign a secret while hiring as many permanent workers as it could before the Union caught on. By the end of December, however, the Union received reports from workers and discovered other clues, and arranged for a meeting with Avery and a federal mediator on January 3, 2000; at that meeting, Avery disclosed that "over 100" permanent replacements had been hired.

On January 5, 2000, the Union offered on behalf of the strikers to return to work immediately. Avery noted that the offer was not unconditional. On January 20, 2000, the Union renewed the offer to return, this time unconditionally. Avery began recalling strikers to positions that had not been occupied by permanent replacements, ultimately reinstating 78 or 79.

The Board Decision

The Board ruled that Avery "properly exercised its right to hire permanent replacements for its striking employees and that it did not violate Section 8(a)(3) [of the Act] when it refused to reinstate the strikers upon their January 20, 2000 unconditional offer to return to work." Bd. Decision at 8. The Board cited the rule that an employer has a right to hire permanent replacement workers – a valuable tool for "fight[ing] back" in an economic battle – absent a showing that the employer had an independent unlawful motive for the hiring, *id.* at 6, and found

that no such unlawful motive was shown here. Effectively, the Board ruled that no inference of unlawful motive could be drawn from Avery's secrecy because an employer is not "under a duty to disclose to a union its intention to hire permanent replacements." *Id.* at 6.

The Board reasoned that an employer has no duty to notify a union that replacement workers are being hired, and may legitimately hire in secret, because at least one valid objective of such hiring – an enhanced ability to withstand the strike – does not depend on making the striking workers aware that they are being replaced. Even assuming that Avery was required to inform the Union, the Board concluded that Avery complied with that requirement at the January 3 meeting. *See id.* at 6. The Board emphasized the "sharp distinction between seeking to prevail over the Union," which is a lawful goal, "and seeking to oust the Union as a bargaining representative," which is not. *Id.* at 7. According to the Board, there was no evidence that Avery was seeking to oust the Union and ample evidence that Avery's goal was to exert economic pressure on the Union to induce it to reach an agreement on terms favorable to Avery. *Id.* We refer to the goal of exerting economic pressure on the Union as the "bargaining leverage rationale" for Avery's conduct.

The dissenting board member concluded that the General Counsel had discharged his burden of showing that Avery had an independent unlawful motive – "to undermine the Union by engendering striker

dissatisfaction with the Union" – for the decision to hire permanent replacements, Bd. Decision at 13, 15 (Walsh, *M.*, dissenting in part), that the burden therefore shifted to Avery to demonstrate that it would have hired the permanent replacements even in the absence of that unlawful motive, *id.* at 14, and that the rationales proffered by Avery had been "exposed as shams," *id.* at 15.

For several reasons, the dissenter rejected the majority's rationale that the hiring of replacements was motivated by Avery's desire for bargaining leverage: (i) Avery's principals explicitly disavowed that rationale; (ii) the Board never explained "how [Avery's] secrecy [was] consistent with a motive to gain economic leverage," when in fact "such leverage could only have been exerted through disclosure," *id.* at 15; and (iii) "*undisclosed, the hiring of replacements exerted no economic leverage,*" *id.* at 15-16 (emphasis in original).

Discussion

A. Applicable Law

Section 7 of the Act, 29 U.S.C. § 157, grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *See also* 29 U.S.C. § 163 ("Nothing in this Act . . . shall be construed so as either to interfere

with or impede or diminish in any way the right to strike. . . ."). To implement this right, § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their § 7 rights. And § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer to "discourage membership in any labor organization."

Under Supreme Court precedent, an employer that refuses to reinstate economic strikers violates § 8(a)(3) unless it can demonstrate that it acted to advance a "legitimate and substantial business justification[]." See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 88 S. Ct. 543, 19 L. Ed. 2d 614 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34, 87 S. Ct. 1792, 18 L. Ed. 2d 1027 (1967)). The hiring of permanent replacement workers amounts to one such legitimate and substantial business justification. See *NLRB v. Int'l Van Lines*, 409 U.S. 48, 50, 93 S. Ct. 74, 34 L. Ed. 2d 201 (1972) ("An employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements."); *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 n. 8, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983) ("The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement of [*Fleetwood Trailer*] that the employer have a legitimate and substantial justification for its refusal to reinstate strikers.") (internal quotation marks omitted). Consequently, "where employees have engaged in an

economic strike, the employer may hire permanent replacements whom it need not discharge even if the strikers offer to return to work unconditionally." *Belknap*, 463 U.S. at 493.

At the same time (as the Board recognized), the Act is violated if "an independent unlawful purpose" motivated the hiring of permanent replacements.¹ Bd. Decision at 5; see also *Hot Shoppes Inc.*, 146 N.L.R.B. 802, 805 (1964). As with other elements of an unfair labor practice, the General Counsel cannot prevail without a finding that the employer had an independent unlawful purpose. See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983).

B. Business Necessity

On appeal, the Union argues that an employer that permanently replaces striking workers bears the burden of establishing that the hiring of replacements was itself motivated by a legitimate and substantial business necessity.² We decline to consider this argument.

¹ Following the Board, we use the terms "purpose" and "motive" interchangeably.

² The Union does not contest the Board's finding that Avery hired over 100 permanent replacements prior to the Union's unconditional offer to return to work, and concedes that Avery reinstated strikers who had not been permanently replaced at the time of that offer.

In the absence of "extraordinary circumstances," we may consider only objections argued before the Board. 29 U.S.C. § 160(e); *see also NLRB v. GAIU Local 13-B*, 682 F.2d 304, 311 (2d Cir. 1982). "The Board has implemented this statutory policy by adopting regulations requiring the parties to raise by exceptions or cross-exceptions all issues they desire the Board to consider in reviewing an ALJ's decision." *GAIU*, 682 F.2d at 311; *see also* Bd. Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.46(b) and (h) (stating that any exception "not specifically urged shall be deemed to have been waived"). The purpose of the statutory requirement and implementing regulations is to ensure that the Board has "an opportunity to rule upon all material issues in a case." *GAIU*, 682 F.2d at 311; *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S. Ct. 67, 97 L. Ed. 54 (1952) ("Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."). Absent an objection or an "extraordinary circumstance []," we are bound by Board determinations, even erroneous ones, that are not "patently in excess of [the Board's] authority." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311, 99 S. Ct. 1123, 59 L. Ed. 2d 333 (1979).

The General Counsel declined to assert the business necessity argument. The General Counsel has complete "discretion to decide whether or not to

issue a complaint, and to determine which issues to include in that complaint," *Williams v. NLRB*, 105 F.3d 787, 791 n. 3 (2d Cir. 1996) (internal citations omitted); see 29 U.S.C. § 153(d) ("[The General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [of the Act], and in respect of the prosecution of such complaints before the Board. . . ."), and his "refusal to include an issue in the complaint is final and unreviewable." *Williams*, 105 F.3d at 791 n. 3.

When the Union itself tried to make the business necessity argument, the ALJ refused to hear it on the ground that the argument "enlarged upon or changed" the allegations of the complaint.³ Bd. Decision at 26 (citing *Kimtruss Corp.*, 305 NLRB 710, 711 (1991) ("It is settled that a charging party cannot enlarge upon or change the General Counsel's theory.")); see also *IBEW, Local No. 903*, 230 N.L.R.B. 1017, 1019-20 (1977) ("To permit the Charging Party to introduce . . . evidence to support theories of violations [other] than the theory relied upon by the General Counsel, is tantamount to granting to the

³ The ALJ referred to the Union's argument as the "inherently destructive" theory" because the Union had argued that the hiring of permanent replacements constituted a form of "inherently destructive" conduct, which under Supreme Court precedent places on the employer (at least) a burden of demonstrating that the conduct was motivated by "legitimate and substantial business justifications." See Bd. Decision at 25-26; see also *Great Dane*, 388 U.S. at 34.

Charging Party authority to amend the complaint in derogation of the authority of the General Counsel who has exclusive authority as to the issuance and conduct of the complaint.”). On appeal to the Board, the Union initially filed – but then withdrew – an exception to the ALJ’s refusal to consider the business necessity argument. It thus transpired that the parties (i.e., the General Counsel and the Union) never actually presented the business necessity argument to the Board. Since we are bound by a Board determination absent “extraordinary circumstances” or Board action “patently in excess” of its authority, and since the Union has brought to our attention evidence of neither condition,⁴ we decline to consider the business necessity argument.

C. The Board’s Findings

The Union challenges the Board’s finding that Avery was not motivated by “an independent unlawful purpose” in hiring permanent replacements, and argues that this finding is unsupported by substantial evidence. We do not reach that question because

⁴ Whatever would necessitate a finding that Board action was “patently in excess” of its authority, the Board’s rejection of the business necessity argument certainly does not constitute such excess given that no Supreme Court precedent compels adoption of the argument. See *Belknap*, 463 U.S. at 504 n. 8 (observing that no Supreme Court precedent compels conclusion that employer’s motive for hiring permanent replacements is relevant).

we conclude that the Board made a central and unwarranted inference that renders its conclusion arbitrary and capricious.

Because Congress has delegated administration of the Act to the Board – whose members we presume to have “broad experience and expertise in labor-management relations” – we accord great deference to the Board’s findings of fact, *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977); we are particularly deferential when the Board draws inferences based on its expertise, see *Radio Officers’ Union v. NLRB*, 347 U.S. 17, 48-49, 74 S. Ct. 323, 98 L. Ed. 455 (1954); see also *NLRB v. Iron Workers*, 434 U.S. 335, 341, 98 S. Ct. 651, 54 L. Ed. 2d 586 (1978) (“[The Board’s] resolution of . . . mixed factual and legal questions normally survives judicial review.”).

Deference has its limits: we are not bound to abide by the Board’s derivative inferences to the extent that they are “irrational,” “tenuous,” or “unwarranted.” *Penasquitos Village*, 565 F.2d at 1079 (internal quotation marks omitted); see also *Universal Camera*, 190 F.2d at 432 (2d Cir. 1951) (“We must abide by [the Board’s derivative inferences] unless they are irrational.”) (Frank, J., concurring). If such an irrational derivative inference is sufficiently central to the Board’s conclusion, the drawing of the inference may be arbitrary and capricious pursuant to 5 U.S.C. § 706(2)(A). See *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974) (“Though an agency’s finding may be supported by substantial

evidence . . . it may nonetheless reflect arbitrary and capricious action.”). In *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, the Supreme Court delineated the proper scope of judicial review:

The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (internal quotation marks and citations omitted); see also *Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 374, 118 S. Ct. 818, 139 L. Ed. 2d 797 (1998) (“Adjudication is subject to the [*State Farm*] requirement of reasoned decisionmaking. . . .”). However, “while we may not supply a reasoned basis for the agency’s action that the agency itself has not given, *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947), we will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Bowman*, 419 U.S. at 285-86.

The ALJ chiefly relied on three pieces of evidence in concluding that Avery acted with the independent

and unlawful purpose of punishing the strikers and breaking the Union's solidarity:

- Avery's principals conceded that "a decision was made not to inform the Union of [Avery's] plans to permanently replace the striking employees," from which the ALJ concluded that Avery "consciously concealed" what it was doing. Bd. Decision at 28, 33.

- On December 31, 1999, Avery CEO Harper sent a memo ("Harper's memo") to Avery's Board of Directors, stating that

as a well-executed surprise event the day before Christmas, we began to permanently replace striking workers at Avery. These new employees have some distinct advantages: they are very pleased to have the job for the money we currently pay; they have fine work ethics; they want to learn; they are less expensive than temporary workers; and they bring predictable stability for the future, when the strike is over, because they say they want to work here for a long time. . . . If [the Union] refuses to seriously negotiate in good faith, we plan to add one or more permanent replacements each day. We have [the Union] in a real bind at Avery.

Id. at 30.

- Scott Cohen, the owner of a temp agency used by Avery, testified that Avery's director of operations told him that its plans

regarding permanent replacements were to be kept "hush-hush" and that it needed to get as many bodies hired as it could before the Union found out. *Id.* at 5.

The Board disagreed with the ALJ, finding that the General Counsel had in fact failed to demonstrate "an unlawful motive in hiring permanent replacements." *Id.* at 6.

We accept the Board's premise that an employer has no legal obligation to inform striking workers before hiring permanent replacements. See *Armored Transfer Serv., Inc.*, 287 N.L.R.B. 1244, 1251 n. 21 (1988). But it was "unwarranted," see *Penasquitos Village*, 565 F.2d at 1079 (internal quotation marks omitted), for the Board to conclude – based on that observation alone – that an employer's decision to keep the hiring of permanent replacements secret is not probative of whether the employer had an independent unlawful purpose for the hiring.

As the Board saw it, Avery's conduct enhanced its bargaining advantage in the "economic battle" by: (i) prolonging its capacity to withstand the strike and (ii) pressuring the strikers to return once they realized that they were being replaced. Bd. Decision at 6. That is sound as far as it goes; but it does not account for the secrecy. Why would an employer lawfully seeking to enhance its bargaining leverage keep secret the hiring of permanent replacements? There may be many legitimate explanations for secrecy – e.g., a fear of picket-line violence – but the Board made recourse

to none.⁵ Absent such countervailing considerations, and even if one adopts the Board's own analytic framework, logic suggests that an employer seeking to enhance its bargaining leverage by hiring permanent replacements would have every incentive to publicize the effort, and that an employer seeking only to prolong its ability to withstand the strike would be indifferent to whether the strikers and the union knew what it was doing.

Conversely, it would appear that employers with an illicit motive to break a union have a strong incentive to keep the ongoing hiring of permanent replacements secret. The replacement of over half of a unionized workforce with nonunion workers would devastate the union's power and credibility. An employer seeking to land such a blow cannot simply announce the hiring of large numbers of replacements, because in order to justify a refusal to allow striking workers to return to work under the "permanent replacement" safe harbor, the employer must have achieved an employment relationship with the

⁵ At the hearing before the ALJ, the Avery Administrator testified that she kept the hiring quiet to avoid picket line violence and striker interference with the hiring of replacements. Specifically, the Administrator testified that she had heard of a number of such violent incidents. (Although the Union points out that there was only one arrest for strike-related misconduct during the duration of the labor dispute). The ALJ found Avery's "fear of violence" rationale not credible because it was based entirely on hearsay evidence, and the Board did not discuss it. Bd. Decision at 33, 34.

permanent replacements somewhere between "a mere offer, unaccepted when the striker seeks reinstatement" and "actual arrival on the job." See *H & F Binch Co. v. NLRB*, 456 F.2d 357, 362 (2d Cir. 1972). So an employer seeking to punish strikers and break a union therefore needs enough time to establish an employment relationship with a large number of permanent replacements before the union can react by offering to return to work, and will therefore have a strong incentive to keep the replacement program secret for as long as possible.

The Board acknowledged that it was "finding only that a purpose of the hiring of replacements was to gain economic leverage. We are *not* saying that the failure to disclose had that purpose." Bd. Decision at 7 n. 19. But the Board does not consider what the purpose of secrecy could have been.⁶ There was therefore no apparent basis for the Board's conclusion that "the non-disclosure did not have an illicit motive." *Id.* at 7. While we bow to the Board's expertise, see *Radio Officers' Union*, 347 U.S. at 48-49, the Board offered no expertise-based analysis of the failure to disclose.

⁶ The Board does state that the characterization of the hiring of permanent replacements in Harper's memo as "a well-executed surprise event. . . restates [Avery's] desire to surprise the Union and thereby obtain an economic advantage in the ongoing contract negotiations." Bd. Decision at 7. To the extent that this statement suggests a rationale for the secrecy (as opposed to the hiring), it is too cryptic for us to discern the Board's reasoning.

App. 41

In sum, the Board erred because it failed to acknowledge the natural and logical implications of the facts it credited and the analytic framework it adopted.

At the same time, this opinion is narrow: Since we do not decide whether substantial evidence supported the Board's conclusion that the Union failed to carry its burden of demonstrating an independent unlawful purpose, this opinion does not preclude the Board on remand from reaching that same conclusion through adequate reasoning.⁷

* * *

⁷ Avery urges us to consider additional evidence on the record that might suggest that it did not possess an independent unlawful motive, in particular that Avery: i) demonstrated an ongoing willingness to negotiate a contract with the Union, ii) agreed to a request by the Mayor of Hartford that Avery stop hiring additional permanent replacements while his mediation efforts were ongoing (despite having unprocessed job applications), and 3) solicited the Union's input on how best to recall strikers to available position, and then followed the Union's suggestions. The Board may also decline to accept the ALJ's negative credibility finding with respect to the evidence that Avery submitted suggesting that fear of picket line violence motivated its decision to keep secret the hiring of permanent replacements (provided the record supports such a reversal). If the NLRB concludes that Avery has refuted the logical implication that its secrecy was illicitly motivated, the NLRB should set forth the analysis supporting this conclusion.

App. 42

The petition is granted, the decision of the Board vacated, and the case is remanded to the Board for further proceedings consistent with this opinion.

Church Homes, Inc. d/b/a Avery Heights and
New England Health Care Employees Union,
District 1199, AFL-CIO

Case 34-CA-9168

NATIONAL LABOR RELATIONS BOARD

*343 N.L.R.B. 1301; 2004 NLRB LEXIS 736;
176 L.R.R.M. 1499; 2004-5 NLRB Dec.
(CCH) P16,858; 343 NLRB No. 128*

December 16, 2004

COUNSEL:

Thomas E. Quigley, Esq., for the General Counsel.

Hugh F. Murray, III, Esq. and Michael C. Harrington, Esq. (Murtha Cullina LLP), of Hartford, Connecticut, for the Respondent.

John M. Creane, Esq., and Kevin A. Creane, Esq., for the Charging Party.

JUDGES: By Peter C. Schaumber, Member; Robert J. Battista, Chairman; Dennis P. Walsh, Member

OPINION:

DECISION AND ORDER

This case presents two main issues: (1) whether the Respondent's discharge of four economic strikers for alleged picket line misconduct violated the Act; and (2) whether the Respondent's failure to reinstate permanently replaced economic strikers violated the Act because the Respondent had an unlawful

independent motive in hiring the permanent replacements.¹ The judge found violations in both instances. Having considered the decision and the record in light of the exceptions and briefs, the Board agrees with the judge only in part. A majority of the panel finds that the Respondent violated Section 8(a)(1) and (3) of the Act in discharging three of the strikers.² A different majority finds that the Respondent lawfully discharged the fourth striker.³ A panel majority further finds no showing that the Respondent had an independent unlawful motive in hiring the permanent replacements, and therefore the Respondent did not violate the Act by failing to reinstate all strikers on their unconditional request to

¹ On November 1, 2001, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief; and the General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

No exceptions were filed to the judge's dismissal of an 8(a)(5) allegation that the Respondent misrepresented to the Union its intentions regarding the hiring of permanent replacements.

² Members Schaumber and Walsh. (Chairman Battista dissents.)

³ Chairman Battista and Member Schaumber. (Member Walsh dissents.)

return to work.⁴ Accordingly, the Board has decided to affirm the judge's rulings, findings,⁵ and conclusions only to the extent consistent with this Decision and Order.

Background

Located in Hartford, Connecticut, Respondent Avery Heights provides nursing home care, assisted living residences, independent living units, and adult day care. New England Health Care Employees Union, District 1199, AFL-CIO (the Union) represents a bargaining unit consisting of the Respondent's approximately 180-185 service and maintenance employees. A collective-bargaining agreement covering these unit employees expired on October 31, 1999. On November 17, 1999, during negotiations for a successor contract, the Union launched an economic strike. The Respondent began hiring permanent replacements on or about December 15, 1999. By January 20, 2000, the date that the Respondent concedes the Union made an unconditional request

⁴ Chairman Battista and Member Schaumber. (Member Walsh dissents.)

⁵ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

for strikers to return to work, the Respondent had hired about 130 permanent replacements. During the recall of striking employees, the Respondent discharged four employees – Opal Clayton, Patricia Hurdle, Georgia Stewart, and Pauline Taylor – for alleged picket line misconduct.

Alleged Violations

I. THE DISCHARGES OF OPAL CLAYTON, PATRICIA HURDLE, AND GEORGIA STEWART⁶

A. *Facts*

Clayton, Hurdle, and Stewart worked for the Respondent as certified nursing assistants (CNAs). Each participated in the strike, serving as a picket captain. During the strike, the Respondent's administrator, Miriam Parker, heard from a nurse that a patient's son had had some sort of encounter with strikers on the picket line. When Parker saw the son, Alan Richards, she inquired about what happened. Richards reported that, during the first week of the strike, while he was in his car waiting in line to exit the facility, Clayton, Hurdle, and Stewart saw him, faced him, raised their hands, and said, "Help me, help me, help me" in imitation of his mother. Richards' mother is known to utter the phrase "help me, help me, help me" repeatedly and uncontrollably.

⁶ Chairman Battista does not join in this section of the decision.

Parker had Richards write out a statement, which was neither dated nor signed.

Following the Union's unconditional offer to return to work, Hurdle and Stewart were recalled and reported to work on January 25, 2000. Each was told, however, not to begin work, but instead to report to Parker and the Respondent's director of nursing, Barbara Brigandi. Parker and Brigandi met with Stewart first, telling Stewart that Richards had accused her of mimicking his mother on the picket line. No other information was provided. Stewart denied the charge, and she was sent home pending investigation. Parker and Brigandi then met with Hurdle. She was told that a family member complained about a gesture she had made on the picket line. On request, she was told that it was Richards who complained. No other details were provided. Hurdle denied the charge, and she was sent home pending investigation. The Respondent conducted no further investigation. On January 26, 2000, the Respondent sent termination letters to Hurdle and Stewart that outlined their alleged misconduct in general terms. Hurdle and Stewart learned the specifics of the allegation on February 17, 2000, at an unemployment office hearing.

Clayton had not yet been recalled by the time of the February 17 unemployment hearing. Clayton was identified at the unemployment hearing as a participant in the alleged misconduct, and she received a termination letter dated February 22, 2000. The

Respondent did not discuss the allegation with Clayton prior to discharging her.

At the hearing, Richards testified that he saw Clayton, Hurdle, and Stewart mimicking his mother. The three CNAs all denied under oath that they did so. Although not doubting that Richards *believed* he saw the three CNAs engaging in the alleged conduct, the judge nevertheless credited the CNAs' denials. The judge found, therefore, that Clayton, Hurdle, and Stewart did not in fact engage in the alleged misconduct.

B. Analysis

An employer may lawfully discharge a striker whose misconduct, under all the circumstances, would reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), *enfd.* 765 F.2d 148 (9th Cir. 1985), *cert. denied* 474 U.S. 1105 (1986). An analogous standard governs where, as here, the misconduct is directed against persons who do not enjoy the protection of Section 7 of the Act. *Id.* at 1046 fn. 14. In cases presenting this issue, the General Counsel has the overall burden of proving discrimination, but the burden of going forward with the evidence shifts. Initially, the General Counsel must show that the employee in question was a striker and the employer took action against the employee for conduct related to the strike. If the General Counsel makes this showing, the

burden shifts to the employer to show that it honestly believed the employee engaged in the conduct for which he or she was discharged. If the employer does so, the burden shifts back to the General Counsel to establish that the employee did not in fact engage in the alleged misconduct. *Detroit Newspapers*, 340 NLRB 1019, 1024 (2003); *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999). Even if the misconduct did in fact occur, the Act will still have been violated if the conduct at issue was not sufficiently egregious under *Clear Pine Mouldings, supra*, to lose the protection of the Act.

In this case, it is unnecessary to traverse each step of the analysis. Based on credibility determinations, which we have adopted, the judge found that Clayton, Hurdle, and Stewart, who were all engaged in the protected activity of striking, did not mimic Richards' mother. Thus, regardless of whether it honestly believed to the contrary, the Respondent violated the Act by discharging Clayton, Hurdle, and Stewart for an act they did not, in fact, commit.⁷

⁷ In finding a violation of the Act for the discharges of Clayton, Hurdle, and Stewart, the judge additionally relied on his findings that the Respondent lacked an honest belief that these three had mimicked Richards' mother, and that even if the alleged incident had occurred, it was not sufficiently egregious to deprive the three CNAs of the Act's protection. Having found that the Respondent violated the Act because the alleged incident did not in fact occur, we find it unnecessary to pass on these additional findings. Thus, the Chairman is incorrect in his dissent, in indicating that the Respondent had a good-faith

(Continued on following page)

Our dissenting colleague rejects the judge's decision to credit Clayton, Hurdle, and Stewart. Stating that the judge based his credibility finding on the employees' employment history, our colleague claims that the employees' long record of no prior misconduct is, "at best, only marginally relevant." We disagree. The judge relied on a number of factors in making his credibility determination, "such as" the three employees' length of service and employment records, and the presence of guards with video cameras. As to the judge's reference to employment history, the fact that persons act well in one context might not guarantee their good conduct in another, but surely it is more than marginally probative of how they would behave. As to the video cameras near the picket line, it is undisputed fact that no videotaped evidence of the alleged incident exists. In addition, at the outset of his decision, the judge stated that his findings were also based on his "observation of the demeanor of the witnesses."⁸

Further, our dissenting colleague asserts that Richards "had nothing against" the alleged discriminatees and was "simply appalled by the[ir] conduct."

belief that the employees engaged in the misconduct, that the majority does "not argue to the contrary." Rather, we do not pass on that issue.

⁸ In adopting the judge's decision to credit the testimony of Clayton, Hurdle, and Stewart, Member Schaumber does not rely on the judge's blanket statement at the outset of the decision that his findings were based on his "observation of the demeanor of the witnesses."

In so stating, our colleague suggests the judge discredited Richards. But the judge did not discredit Richards; rather, he found that Richards was sincere in his belief of what happened, but mistaken. The record supports this finding. In addition to the three employees' credited denials, the record reveals that at the time of the alleged incident, Richards was 60 feet away from the picketers, in a car with the windows rolled up. In addition, there were other factors that called into question the reliability of his testimony. Richards insisted the incident lasted 30 seconds despite the 3 seconds it took him to utter the words "help me, help me, help me" in his testimony; Richards incorrectly claimed no one else was talking or making noise on the picket line at the time of the alleged incident; and although he crossed the picket line multiple times a day, Richards said he *never* heard cheering or chanting.⁹ In sum, then, we see no reason to second-guess the judge's credibility-based findings concerning this alleged incident.

⁹ Further, while we adopt the judge's finding that Richards was sincere in his belief but mistaken, the record does not support our colleague's assertion that Richards "had nothing against" the alleged discriminatees. He once complained to the Respondent about the alleged discriminatees' work performance; the strike concerned him because it disrupted his mother's care; he occasionally drove his mother's personal caregiver, who also worked for the Respondent, into the facility, and he thought it was unfair of strikers to call her a scab as he drove by; and Richards said to a picketer, after the end of the strike, "It'll be 10 years before you get anything out of this."

II. THE DISCHARGE OF PAULINE TAYLOR¹⁰

A. *Facts*

Taylor worked as a CNA for the Respondent. The Respondent had discharged Taylor in 1998, but was obligated, pursuant to an arbitration award, to reinstate her without backpay in August 1999. Shortly before her reinstatement, the Respondent's chief executive officer, Norman Harper, told the Union's president that he never wanted to take Taylor back.

Taylor joined the strike at its inception. During the strike, Parker received a complaint about Taylor from Kathy Falcon, the daughter of an 82-year-old resident of the Respondent's nursing home. Falcon provided Parker a written statement, which alleged that on December 4, 1999, at approximately 9:15 p.m., as Falcon was stopped in her vehicle near the picket line with her window half-way down, Falcon heard Taylor screaming something at her. According to Falcon's signed statement, Taylor's "*exact* words were – 'there's that bitch Horan's daughter. That bitch – that piece of trash! She's a little piece of trash and so is her mother.'" (Emphasis in original.) Prior to this incident, Falcon had testified for the Respondent against a friend of Taylor at an arbitration hearing. On February 22, 2000, before Taylor was recalled to work, the Respondent sent her a termination letter for cursing and insulting a resident and her family member.

¹⁰ Member Walsh does not join in this section of the decision.

B. Analysis

Applying the burden-shifting analysis summarized above, the judge found it undisputed that Taylor was terminated for strike-related misconduct. Thus, the burden shifted to the Respondent to show it honestly believed that Taylor had engaged in that misconduct. The judge found that the Respondent failed to sustain this burden. In so finding, the judge emphasized that the discharge decision was based on Falcon's statement alone, without the Respondent's having conducted any further investigation. In this connection, the judge referenced his previous discussion of the other three CNA discharges, in which he observed that the Respondent's pre-strike practice had been to investigate allegations of misconduct before taking disciplinary action. The judge also relied on the fact that the Respondent gave Taylor no opportunity to respond to Falcon's accusation. Although the judge found, based on credited testimony, that Taylor probably engaged in the alleged conduct, he concluded that the Respondent did not meet its burden of showing it acted in good faith when it discharged Taylor. Rather, he concluded that the Respondent seized on Falcon's report to rid itself of a union-activist employee it had previously tried to discharge and never wanted to take back.

The judge also found that, even if the Respondent honestly believed that Taylor had done what Falcon said, such conduct was not egregious enough to warrant the denial of reinstatement. To be sufficiently egregious under the objective standard of

Clear Pine Mouldings, supra, strike-related misconduct must have a reasonable tendency, under all the surrounding circumstances, to coerce or intimidate. The judge held that, under Board precedent, verbal assaults like Taylor's do not reasonably tend to coerce or intimidate unless they are accompanied by overt or indirect physical threats or otherwise make a physical confrontation reasonably likely. Although he criticized Taylor's outburst as "profane, abusive and unprofessional," the judge found there was no evidence of any words or actions that "could reasonably be deemed threatening or likely to result in a physical confrontation." Accordingly, the judge found that the Respondent violated Section 8(a)(3) when it discharged Taylor for her picket line misconduct.

Contrary to the judge, we find that the Respondent did have an honest belief that Taylor shouted the words attributed to her by Falcon (as she in fact did), and that Taylor's misconduct was egregious enough to result in the loss of her reinstatement rights.

1. The Respondent's honest belief

Board precedent establishes a relatively low threshold for an employer to show it honestly believed that a striking employee engaged in misconduct. Although the employer must do more than merely assert an honest belief, some specific record evidence linking particular employees to particular allegations of misconduct will suffice. *General*

Telephone Co. of Michigan, 251 NLRB 737, 739 (1980). An employer's honest belief may be based on hearsay sources, including the reports of nonstriking employees, supervisors, security guards, investigators, police, and others. See *Detroit Newspapers*, *supra*, 340 NLRB No. 121, slip op. at 7. Moreover, an employer need not interview the accused striking employee before taking disciplinary action. See *Giddings & Lewis, Inc.*, 240 NLRB 441, 448 (1979).

The Respondent's showing meets the foregoing standard. Falcon's signed statement linked Taylor to a particular allegation of misconduct. Moreover, the report was specific and circumstantially detailed, and Falcon's prior testimony against Taylor's friend would furnish a motive for the conduct Falcon reported. Contrary to the judge, the Respondent was not obliged to give Taylor an opportunity to respond before taking disciplinary action.

In finding the violation, the judge relied in part on the fact that the Respondent did not follow its past practice of investigating allegations of misconduct prior to making disciplinary decisions. That past practice, however, is irrelevant to the applicable legal analysis. Under *General Telephone*, the employer need only show "some specificity in the record, linking particular employees to particular allegations of misconduct." 251 NLRB at 739. The purpose of this requirement is simply to afford the General Counsel a fair opportunity to meet his ultimate burden of proving that the employee did not in fact engage in the alleged misconduct. That is, if the General Counsel

were without knowledge as to the misconduct that the respondent is relying on and as to the identity of employees who allegedly engaged in it, the General Counsel's task would be impossible. As the Board explained in *General Telephone*, "[i]t is not the General Counsel's responsibility to ferret out what alleged misconduct Respondent relied on in disciplining each employee." *Id.* Here, as noted above, Falcon's statement contained more than enough detail to enable the General Counsel to proceed and try to prove that Taylor did not, in fact, engage in the misconduct of which she was accused. The dissent requires more than is necessary. The dissent, in effect, requires the Respondent to prove that Taylor committed the alleged misconduct. This is far more than "some specificity" that is required under *General Telephone* to establish the Respondent's honest belief. Further, it is not for the Board to say that a better investigation would have uncovered more. It is enough that the Respondent shows "some specificity" for its belief.¹¹

Our colleague also confuses the nature of the General Counsel's case. The General Counsel is not alleging a discriminatorily motivated 8(a)(3)

¹¹ Our colleague suggests that the Respondent purposely chose to forego further inquiry in order to avoid finding any facts to the contrary. If there were evidence of such a motive, that could show bad faith. However, there is no such evidence.

discharge.¹² Rather, the General Counsel is alleging that the Respondent did not have a good-faith belief that Taylor engaged in misconduct, and, even if Respondent had such a belief, Taylor was innocent of the misconduct. See *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999) (*Wright Line*, 251 NLRB 1083 (1980), analysis inappropriate for striker misconduct discharge). For the reasons indicated herein, we reject both contentions.

In further support of the Respondent's good-faith belief that Taylor had engaged in the alleged conduct, we note that the Respondent discharged Taylor in 1998 for alleged patient abuse. Given the Respondent's belief that Taylor had committed patient abuse, it was all the more likely that the Respondent would honestly believe an impartial, highly specific allegation that Taylor had again engaged in abusive behavior.

For all of the foregoing reasons, we find that the Respondent had an honest belief that Taylor had engaged in the conduct for which she was discharged.¹³

¹² Thus, as our colleague acknowledges, "it is undisputed that the Respondent discharged Taylor for conduct related to the strike."

¹³ Although our dissenting colleague acknowledges the low burden for an employer in establishing its honest belief that a striker engaged in misconduct, he nevertheless appears to require the Respondent to have undertaken an investigation thorough enough to establish the misconduct as a certainty.

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2. The egregiousness of the conduct

Also contrary to the judge, we find that Taylor's misconduct was egregious enough to result in the loss of her Section 7 reinstatement rights. Specifically, we disagree with the judge's finding that Taylor's comments could not reasonably be deemed threatening or likely to result in a physical confrontation. Taylor referred to Falcon's mother, Mrs. Horan, as a "bitch" and a "piece of trash." At the time, Mrs. Horan was a vulnerable 82-year-old resident of a nursing home. Given Taylor's choice of words and her decision to yell them at Falcon in a public setting, it is apparent that Taylor harbored feelings of hostility toward Mrs. Horan and considered her undeserving of proper treatment. In these circumstances, and contrary to our dissenting colleague, we find that Taylor's statement could reasonably be deemed an implied threat that Taylor would mistreat Horan upon Taylor's return to work, possibly in a position as Horan's caregiver. Thus, we find that Taylor's comments would reasonably tend to coerce or intimidate others under *Clear Pine Mouldings, supra*, and therefore were egregious enough to justify the loss of her reinstatement rights.¹⁴

Board law is clear that the Respondent has no such duty. See, e.g., *Detroit Newspapers, supra*, slip op. at 6.

¹⁴ Further, even if the comment was not a threat of future mistreatment of Horan's mother, Chairman Battista finds that the conduct is sufficiently egregious to warrant discipline. Simply stated, it is unacceptable to have a caregiver in a

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For all of the above reasons, we find that the Respondent did not violate Section 8(a)(3) by discharging Taylor for picket line misconduct.

III. THE HIRING OF PERMANENT REPLACEMENTS¹⁵

A. *Facts*

The strike began on November 17, 1999. Initially, the Respondent relied on nonstriking employees, managers, temporary employees, and volunteers to fill in for the strikers. As it admitted in its answer, however, the Respondent commenced hiring permanent replacements on December 15. The Respondent also offered permanent jobs to temporary workers it had taken on since the beginning of the strike.

The Respondent admits that it decided not to inform the Union of its decision to permanently replace the striking employees. Scott Cohen, the owner of one of the agencies supplying temporary employees to the Respondent, testified that the Respondent's director of operations told him that its plans regarding permanent replacements were to be kept "hush-hush" and that it needed to get as many bodies hired as it could before the Union found out.

nursing home refer to an elderly patient as a "bitch" and a "piece of trash." No nursing home should be compelled by the government to retain such an employee.

¹⁵ Member Walsh does not join in this section of the decision.

Based on blind ads for jobs similar to those held by the strikers, the Union became suspicious that the Respondent was planning to hire permanent replacements. Around the end of December 1999, the Union received a report from someone who claimed that she was offered a permanent job with the Respondent. The Union then arranged for a meeting with the Respondent and a Federal mediator on January 3, 2000. At the January 3 meeting, the Respondent admitted that it already had hired "over 100" permanent replacements.

On December 31, 1999, Harper sent a memorandum to the Respondent's board of directors. The memorandum noted that "as a well-executed surprise event the day before Christmas, we began to permanently replace striking workers at Avery. . . . So far, we have hired 104 permanent replacements at Avery, replacing 60% of those on strike. If [the Union] refuses to seriously negotiate in good faith, we plan to add one or more permanent replacements each day. We have [the Union] in a real bind at Avery."

B. Analysis

An employer violates Section 8(a)(3) by failing to immediately reinstate striking employees on their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for failing to do so. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Capehorn Industry*, 336 NLRB 364, 365 (2001). The

employer establishes a legitimate and substantial business justification where it shows that the positions claimed by the strikers are filled by permanent replacements. *Fleetwood Trailer, supra*; see *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). However, a violation will still lie if it is shown that, in hiring the permanent replacements, the employer was motivated by "an independent unlawful purpose." *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964). Apart from such a purpose, the employer's motive for hiring permanent replacements is immaterial. *Id.*

The theory of the General Counsel's case was that in hiring permanent replacements, the Respondent had an independent unlawful purpose: punishing the strikers and breaking the Union's solidarity by replacing a majority of the unit employees. The judge found that the General Counsel proved an independent unlawful motive for the following reasons.

First, the Respondent concealed its hiring plans from the Union. "An employer who hires permanent replacements in secret," the judge wrote, "without affording the strikers an opportunity to abandon the strike and return to their jobs while still vacant, may be motivated not by legitimate business considerations, but by a desire to punish the strikers by effectively terminating them." The Respondent claimed that it was concerned about union harassment and misconduct if the Union were to become aware of the

hiring scheme, but the judge rejected that claim as unsupported by the record.

Second, the judge found that Harper's December 31, 1999 memorandum demonstrated the Respondent's intent to use replacements to break the solidarity of Avery's union employees by replacing a majority of the unit before the Union found out, thus putting pressure on the Union to acquiesce in the Respondent's bargaining position. The judge also viewed Harper's memo in light of Cohen's testimony, which he credited, and which showed that the Respondent was aiming to replace a majority of the unit before the Union found out. Based on the Respondent's concealment, Harper's memorandum, and Cohen's testimony, the judge found that the Respondent had an independent unlawful motive for hiring permanent replacements, and that the unlawful motive outweighed the business justifications advanced by the Respondent for its permanent replacement hires. Accordingly, the judge found that the Respondent violated Section 8(a)(3) by failing to reinstate the striking employees in response to the Union's January 20, 2000 unconditional offer to return to work.

We disagree with the judge. It is important to properly frame the issue in this case. The Respondent permanently replaced the economic strikers. It is clear beyond peradventure that an employer has a right to do so. See *NLRB v. Mackay Radio*, 304 U.S. 333 (1938). The rationale for this result is that employers have a right to "fight back" in the economic

battle and the right to try to continue operations during a strike. Our colleague seems to recognize this, and seeks only to show that the Respondent's real motive here was to break the Union, as distinguished from the motives of winning the economic battle and continuing operations. In this regard, he posits a *Wright Line*¹⁶ test as to motive. We conclude there was no showing of an independent unlawful motive in this case.

The judge's finding of an independent unlawful motive is based on three primary facts: the Respondent's acknowledged secrecy in hiring permanent replacements, Cohen's "hush-hush" testimony, and Harper's December 31, 1999 memorandum. We do not find that these facts, either separately or in any combination, establish an unlawful motive in hiring permanent replacements. Cohen's testimony simply confirmed the Respondent's secrecy in hiring the permanent replacements, a fact that the Respondent has openly acknowledged in this proceeding. Moreover, the Board has never held that an employer is under a duty to disclose to a union its intention to hire permanent replacements. Our dissenting colleague finds secrecy to be inimical to any lawful motives an employer might have for choosing to hire replacements. However, he does not dispute that Board precedent imposes no obligation on an

¹⁶ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

employer to inform a union of its plan to hire permanent replacements. Rather, citing *Eads Transfer*, 304 NLRB 711 (1991), he states that the Respondent should have provided notice that it was hiring permanent replacements because, in the situation of a bargaining lockout, the Board requires an employer to provide notice of the lockout. A lockout is for the purpose of bringing pressure to bear on the employees and their union, so that they will yield to the employer's bargaining position. Thus, it is essential that the employer give the union notice of the lockout. By contrast, hiring strike replacements enhances the employer's position in two ways: (1) the employer can operate during the strike and can thus "hold out" longer than the strikers (who are not receiving an income); and (2) the strikers will learn of their being replaced and will pressure their union to accept the employer's bargaining position. We agree that the second factor presupposes that the employees are aware that permanent replacements have been hired. The first factor is not dependent on such knowledge. Thus, the Respondent need not disclose the hiring of permanent replacements.

But even assuming that the notice requirement should apply in the context of permanent replacements for strikers, the Respondent complied with that requirement. As explained in *Eads Transfer* and again in *Ancor Concepts*,¹⁷ notice of a lockout must be

¹⁷ *Ancor Concepts, Inc.*, 323 NLRB 742, 743-744 (1997).

given "before or in immediate response to the strikers' unconditional offers to return to work." 323 NLRB at 744 (citing *Eads Transfer*, 304 NLRB at 713). The Respondent here did exactly that – in immediate response to the strikers' first offer to return to work on January 5, the Respondent informed some of them that they were permanently replaced.¹⁸ Indeed, the Respondent told the Union, even before January 5, that it was permanently replacing the strikers. On January 3, the Respondent gave this information to both the Union and the FMCS. Apparently, our dissenting colleague would require that this information be disclosed still earlier, i.e., at the time of the decision to replace or at the time of the commencement of hiring replacements. As noted above, we know of no duty to disclose at all, much less a duty to disclose at a particular time. Accordingly, these facts, and the record in general, demonstrate merely that the Respondent used the hiring of permanent replacements to gain economic leverage over the Union in bargaining, and to continue operations during the strike.

Our colleague insists that the failure to disclose the hiring of replacements at the time of such hiring establishes that the hiring was for an illicit motive. CEO Harper testified about the fact that the Respondent did not tell the Union about the permanent

¹⁸ As for others whose positions were still vacant, the Respondent reinstated the strikers.

replacements. Harper said that this nondisclosure was not for the purpose of gaining economic leverage in bargaining. Our colleague seizes on this point to argue that the secrecy was for the purpose of undermining the Union's status. However, this is a non sequitur. A purpose of the hiring of replacements was to gain economic leverage in bargaining.¹⁹ As stated above, there is no duty to disclose the use of this weapon. Nor is there an obligation to justify such a nondisclosure. Thus, the nondisclosure did not have an illicit motive.

Finally, the Respondent did tell the Union about the hiring of replacements. It did so only 2 weeks after the hiring began. Thus, at that point the disclosure itself had the purpose of placing bargaining pressure on the Union. The fact that there was a 2-week delay in such disclosure does not establish an illicit motive.

In finding improper motive, the judge has missed an important distinction. There is a sharp distinction between seeking to prevail over the

¹⁹ Contrary to the suggestion of our colleague, we are finding only that a purpose of the hiring of replacements was to gain economic leverage. We are *not* saying that the failure to disclose had that purpose.

We think that it is obvious, and not "abstract" as our colleague asserts, that an employer (including the Respondent) gains an economic advantage by being able to operate with replacements during a strike. We do not contend that an employer (including the Respondent) necessarily gains an economic advantage by not *disclosing* the hiring of replacements.

Union and seeking to oust the Union as bargaining representative. The former is what the Respondent did here. Although a victory over a union in an economic battle may cause employee disaffection from the union, that does not take away the employer's right to seek to win the economic battle.

The evidence in this case, including Harper's memorandum, simply does not establish some kind of a nefarious scheme to punish striking employees by hiring permanent replacements. Contrary to the judge's interpretation, Harper's memorandum shows that the Respondent wanted to gain an advantage in bargaining and nothing more. The memorandum speaks of placing the Union "in a real bind" at both of the facilities where it was negotiating with the Respondent.²⁰ That bind was economic. As the Respondent filled the unit with new employees with fewer loyalties to the Union, the Respondent changed the mathematics of both support for the strike and a future contract ratification vote. This placed greater pressure on the Union to reach agreement on terms more favorable to the Respondent. By the same token, if the hiring of replacements persuaded some employees that further striking was unwise, that would inure to the bargaining benefit of the employer.

The judge acknowledged this fact when he characterized the "surprise" to which Harper's memo

²⁰ The complaint allegations concern only the Respondent's actions at the Avery Heights facility.

refers as "a strategic move to break the solidarity of the union employees at Avery and put economic pressure on the leadership at both Avery and [the other facility] to acquiesce to the Respondent's bargaining position." The judge found this to be a sinister, unlawful motive on the Respondent's part. We do not. Rather, the judge's own characterization of the Respondent's goal clearly states the Respondent's legitimate aim to obtain economic leverage in bargaining.

Although Harper's memorandum characterized the hiring of permanent replacements as "a well-executed surprise event," that is no more than a restatement of the Respondent's acknowledged policy of secrecy surrounding the hires. Harper's memorandum also lists several "distinct advantages" of hiring permanent replacements. Conspicuously absent from this list is any reference at all to the strikers, much less a reference to a desire to punish them. That is a telling omission. Thus, Harper's characterization of the hiring event merely restates the Respondent's desire to surprise the Union and thereby obtain an economic advantage in the ongoing contract negotiations.

Further, even assuming, as our dissenting colleague would have it, that the Respondent's motive was to break the Union's solidarity in the economic battle, such an objective is not unlawful. The judge and the dissent lose sight of the big picture here – the parties were engaged in economic warfare. To win that battle, the Union deployed its strike weapon in

the midst of bargaining negotiations, with the hope of securing agreement on its terms for a new contract.

In essence, the Respondent had two options. It could either capitulate to the Union's demands, or it could employ economic weapons of its own. As the Supreme Court observed in *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 152-153 (1976), permanent replacement is an economic weapon, and the Respondent's choice to wield that weapon to break the Union's solidarity was entirely consistent with the purpose of economic weaponry – to inflict punishing economic harm on the other party in order to force that party to yield in the economic bargaining dispute. See *Central Illinois Public Service Co.*, 326 NLRB 928, 931-932 (1998).

In *Central Illinois Public Service*, the respondent utilized a lockout as its economic weapon to counter the union's "inside game" strategy, a newly devised economic weapon in which employees, as an alternative to a strike, remained on the job but engaged in work-to-rule tactics and refused to work voluntary overtime.²¹ The judge, like the judge and our dissenting colleague here, found the employer's action violated Section 8(a)(1) and (3) because it was designed to "punish employees for engaging in protected activity." 329 NLRB at 929. This conclusion was based on the judge's view of the evidence showing that the

²¹ The Board assumed *arguendo* that the employees' conduct was protected.

"lockout had one, and only one, objective – to stop the Union's inside game activities." *Id.* at 931. In reversing the judge, the Board found, as we do here, that "even assuming as true that the sole objective of the lockout was to force the unions to cease their inside game activities, such is not an impermissible business objective." *Id.* The Board explained that to hold otherwise disregards the Supreme Court's decision in *American Ship Building*²² that a union's right to strike in support of its bargaining position "does not entail any right to insist on one's position free from economic disadvantage." *Id.*, quoting *American Ship Building* at 309.²³

We recognize that the employer weapon in *Central Illinois* was a lockout and here it was permanent replacement of strikers. However, in both cases, the weapon was designed to win the economic battle.

In disregard of this precedent, the dissent contends, in effect, that the Union's protected right to employ its economic strike weapon against the Respondent was shielded from any adverse counteraction by the Respondent. This is not the law. The Union's strike weapon was causing economic injury to the Respondent's operations. Permanent replacement was the Respondent's economic counter-weapon,

²² *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).

²³ The Board's decision was enforced by the D.C. Circuit. See *Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (2000).

deployed with the lawful intended effect of forcing the strikers and their Union to yield.

Our dissenting colleague complains that the Respondent only belatedly pled the "bargaining weapon" justification for the hiring of replacements. However, that complaint misses the point. As discussed above, it was the General Counsel's initial burden to prove unlawful motive, not the Respondent's burden to prove a business justification, for hiring permanent replacements. Inasmuch as that burden was not met, the analysis need not reach the Respondent's business justification defense. In any event, that defense is a meritorious one. As discussed above, the hiring of permanent replacements during an economic strike has a legitimate business justification under well-settled law. It is simply too late in the law's development to argue the contrary. The only argument available to the General Counsel rests on motive, and that argument has not been supported.

In sum, although the Respondent's actions had serious consequences for the striking employees, there is nothing unlawful in its motive of achieving its ultimate, lawful goal of pressuring the Union into settling the contract terms on a basis more agreeable to the Respondent. Accordingly, we find that the Respondent properly exercised its right to hire permanent replacements for its striking employees and that it did not violate Section 8(a)(3) when it refused to reinstate the strikers upon their January 20, 2000 unconditional request to return to work.

AMENDED REMEDY

As stated above, the judge found that the permanent replacement of the strikers was unlawful. Accordingly, the make-whole remedy he provided for discharged strikers Clayton, Hurdle, and Stewart did not take into account whether any of them had been permanently replaced. However, we have found, contrary to the judge, that the permanent replacement of the strikers was lawful. Therefore, if any of the three employees, Clayton, Hurdle, or Stewart, was permanently replaced before her unlawful discharge, the judge's remedy must be amended to provide that backpay for that individual or those individuals shall commence on the date the Respondent was obligated to recall her or them to work. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

Hurdle and Stewart were not permanently replaced. Each received a letter dated January 21 instructing her to report for work on January 25, which was the first date that returning strikers were recalled following the Union's January 20 offer to return to work. Although both employees arrived at the Respondent's facility on time and dressed for work, they were not permitted to start work. A few days later, they were unlawfully discharged. Accordingly, their backpay will commence on January 25.

Clayton, however, had been permanently replaced. She received a letter from the Respondent notifying her of that fact and informing her that her

name had been placed on a preferential rehire list. Clayton was unlawfully discharged prior to being recalled. Accordingly, her backpay will commence on the date that she would have been recalled but for her unlawful discharge. That date may be determined at the compliance stage of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Church Homes, Inc. d/b/a Avery Heights, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting New England Health Care Employees Union, District 1199, AFL-CIO or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Opal Clayton, Patricia Hurdle, and Georgia Stewart full reinstatement to their former jobs or, if

those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. If no employment is available for Clayton by virtue of her having been permanently replaced, she shall be placed on a preferential hiring list based on seniority, or some other nondiscriminatory basis, for employment as jobs become available.

(b) Make the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision, as amended.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of the above-named employees, and within 3 days thereafter notify those employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or within such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Hartford, Connecticut facility copies of the attached notice marked "Appendix."²⁴ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 26, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

²⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

DISSENT BY:

BATTISTA (In Part); WALSH (In Part)

DISSENT:

[EDITOR'S NOTE: THE PAGE NUMBERS OF THIS DOCUMENT MAY APPEAR TO BE OUT OF SEQUENCE; HOWEVER, THIS PAGINATION ACCURATELY REFLECTS THE PAGINATION OF THE ORIGINAL PUBLISHED DOCUMENTS]

CHAIRMAN BATTISTA, dissenting in part

I disagree that the General Counsel has shown, by a preponderance of the evidence, that employees Clayton, Hurdle, and Stewart did not engage in picket line misconduct. The misconduct was that the three employees ridiculed the mother of Alan Richards.

First, I find that the Respondent had a good-faith belief that the three employees engaged in the misconduct. Indeed, my colleagues do not argue to the contrary. The Respondent, through Dr. Parker, acted on the basis of what Richards told her. The burden then shifted to the General Counsel to prove that the employees had not engaged in the misconduct.

Richards testified unequivocally that he saw and heard the three employees ridicule his mother, an elderly and frail patient at the Respondent's nursing

home. The three employees denied the misconduct. The judge credited that denial. In doing so, the judge did not rely upon their particular testimonial demeanor.¹

The three employees had an obvious interest in testifying as they did. Their very jobs depended on that testimony. By contrast, Richards was a disinterested witness. He had nothing against these employees, and no reason to help the Respondent in litigation. He was simply appalled by the conduct concerning his mother.

My colleagues dispute my characterization of Mr. Richards as a disinterested witness by noting that he was opposed to the strike. I disagree. Although Richards was upset about the strike, that sentiment was only because he was concerned that the strike would interfere with his mother's care. There is no suggestion that he took sides as to the bargaining issues in dispute. Further, his opposition to the strike, which involved 180 employees, does not explain why he would wish to single out the 3 strikers to accuse them of misconduct. Indeed, Richards was reluctant to accuse them; he did not seek out the Respondent to report their misconduct.

¹ The judge made a general statement, at the outset of his opinion, that he relied upon "his observation of the demeanor of the witnesses." He gave no further explanation. Moreover, he made no specific reference to the demeanor of the witnesses as to the particular incident involved herein.

In crediting the three employees, the judge relied upon their employment history, including the length of employment and the record of that employment. However, the fact that the employees engaged in no prior misconduct for a long period of time at work is, at best, only marginally relevant to whether they engaged in misconduct on a picket line in the midst of a bitter labor dispute.

In an effort to support the judge's credibility finding, my colleagues rely upon factors that the judge himself did not rely upon. It is little wonder that the judge declined to rely upon these factors for they do not support his credibility resolution. First, the three strikers were "yelling" their taunts from 60 feet away. It is not unreasonable to say that this yelling could be heard from that distance. Second, although the judge found that Richards' car window (singular) was rolled up, he did not say that the other windows were rolled up. Third, the fact that the taunting words "help me, help me, help me" can be uttered in 3 seconds does not mean that the entire incident lasted only 3 seconds.

The judge relied upon the lack of videotape evidence. However, videotape would not capture the verbal taunts involved herein. Similarly, the guards were instructed to videotape only "inappropriate incidents." Of course, the guards would not have recognized the cruelty of the taunt "help me." Only Richards would recognize that.

In sum, I do not believe that the judge's finding of fact is supportable. At most, the evidence is in equipoise. Thus, there is not a preponderance of evidence supporting the General Counsel's contention.

Finally, there can be little doubt that the misconduct was sufficiently egregious to warrant discharge. Indeed, it is difficult to think of any conduct more heinous than that of nursing home employees who ridicule a cry for help by an elderly and frail patient.

NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part

It is well established that the "employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions." *Inland Steel Co.*, 257 NLRB 65, 68 (1981), *enfd. mem.* 681 F.2d 819 (7th Cir. 1982). Today, however, in reversing an administrative law judge and holding that the Respondent lawfully refused to reinstate economic strikers, the majority relies not on a justification the Respondent advanced, but on one it explicitly disavowed. Compounding its error, the majority conjures up a "justification" that amounts to a blanket endorsement of an employer's blatant use of its raw economic power, not to maintain business operations during a strike, but to erode the strikers' support for the Union. Accordingly, I must dissent from the majority's reversal of the judge's well-reasoned

finding that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the strikers upon their unconditional offer to return to work. Before turning to that issue, I will first address another of the majority's errors: the reversal of the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Pauline Taylor.²

I. THE DISCHARGE OF PAULINE TAYLOR

A. *Facts*

Taylor worked as a CNA for the Respondent. She had been a union delegate since 1992, had served as one of the Union's two chapter officers, and was a picket captain during both a strike in 1995 and the 1999 strike at issue here. The Respondent discharged Taylor in 1998, but was obligated, pursuant to an arbitration award, to reinstate her without backpay in August 1999. Shortly before her reinstatement, the Respondent's chief executive officer, Norman Harper, told the Union's president that he never wanted to take Taylor back and that he did not like her as a human being.

Taylor joined the 1999 strike at its inception. During the strike, the Respondent's administrator, Miriam Parker, received a complaint about Taylor from a resident's daughter, Kathy Falcon. Parker had

² I agree with Member Schaumber that the Respondent violated Sec. 8(a)(3) and (1) by discharging Opal Clayton, Patricia Hurdle, and Georgia Stewart.

Falcon provide a written statement, which alleged Taylor yelled at Falcon as she was leaving the facility on December 4, 1999. Falcon wrote that Taylor's "exact words were – 'there's that bitch Horan's daughter. That bitch – that piece of trash! She's a little piece of trash and so is her mother.'" (Emphasis in original.) On February 22, 2000, before Taylor was recalled to work, the Respondent sent her a termination letter for cursing and insulting a resident and her family member.

B. Analysis

It is well settled that an employer may discharge a striker whose misconduct, under all the circumstances, may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. *Clear Pine Mouldings*, 268 NLRB 1044 (1984), *enfd.* 765 F.2d 148 (9th Cir. 1985), *cert. denied* 474 U.S. 1105 (1986). The Board applies an analogous test in considering a striker's misconduct directed against persons who do not enjoy the protection of Section 7 of the Act. *Id.* at 1046 *fn.* 14. If the General Counsel establishes that an employee was discharged for strike-related conduct, the burden shifts to the Respondent to show it had an honest belief that the striker engaged in the conduct for which he or she was discharged. If the Respondent establishes its honest belief, the burden shifts back to the General Counsel to establish that the striker did not in fact engage in the alleged misconduct. *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999). Even where

the employer has an honest belief that the employee engaged in misconduct and the employee in fact did so, verbal conduct will warrant discharge only if it reasonably tends to coerce or intimidate employees in the exercise of rights protected under the Act, or if it meets the analogous test for misconduct directed against persons who do not enjoy the Act's protection. *Clear Pine Mouldings, supra* at 1046 fn. 14.

It is undisputed that the Respondent discharged Taylor for conduct related to the strike, and neither the General Counsel nor the Union has excepted to the judge's finding that Taylor did, in fact, commit the alleged act. Accordingly, the lawfulness of the Respondent's disciplinary action turns on whether it had an honest belief that Taylor committed the act at the time it discharged her, and whether Taylor's comments were so egregious that they warranted the loss of her reinstatement rights. For the reasons discussed below, the judge correctly found (1) that the Respondent was not acting honestly and in good faith when it terminated Taylor, and (2) that even if it was, Taylor's conduct did not warrant discharge.

1. The Respondent's honest belief

The Board has held that an employer's honest belief must be supported by record evidence linking the striker to the alleged misconduct. *General Telephone Co. of Michigan*, 251 NLRB 737, 739 (1980). Although the employer is not necessarily obligated to interview the accused striker, whether it had an

honest belief is judged on the basis of the evidence available to it when it took the disciplinary action at issue. *Detroit Newspapers*, 340 NLRB 1019, 1025 (2003); *Giddings & Lewis, Inc.*, 240 NLRB 441, 448 (1979). Although the Respondent's burden of proof on this matter is not heavy, an examination of the circumstances of this case demonstrates that it ignored all potentially available evidence except for Falcon's report. Thus, as the judge concluded, the Respondent used Falcon's report as an excuse to get rid of a striking union activist who the Respondent's chief executive officer identified approximately 6 months earlier as someone he did not want to re-employ.

The Respondent discharged Taylor based on a single report from one resident's family member without investigating the allegation in any way. In *Giddings & Lewis, supra*, although the disciplined striking employees were not interviewed, the employer relied on oral and written reports of supervisors, public records (including arrest reports), interviews with witnesses and police officials, and a film record of picket line misconduct. Under those circumstances, the Board found it "not unreasonable" for the employer to dispense with interviews of the strikers. *Id.* at 448. Here, by contrast, the Respondent avoided any inquiry whatsoever into the matter. The Respondent did not ask the security guards it hired for the strike, or anyone else, if they could corroborate Falcon's allegation. Neither did the Respondent attempt to check videotape footage shot by its

security guards to see if the confrontation Falcon alleged had been captured by a camera that was to be used when misconduct occurred. The Respondent's failure to even attempt to verify Falcon's report shows that it was not acting in good faith when it decided to terminate Taylor.³

Furthermore, the Respondent's handling of the Taylor situation was notably different from its ordinary course of business. Parker testified that, in contemplating discipline for employee misconduct, she ordinarily conducts an investigation and looks into all the details in order to be fair to the accused employee. The Respondent's nursing department policy and procedure manual requires a thorough investigation of abuse. Further, Jon Webb, a union delegate, testified that of the 40 suspensions and 9-10 terminations in which he has represented union members, Taylor's discharge was one of only two cases that involved suspension or termination without the employee first being allowed to respond to the allegations of misconduct. (Opal Clayton's discharge was the other.)

Moreover, the Respondent's handling of the discharges of Hurdle and Stewart provides further

³ The "honest belief" requirement has been described as synonymous with a "good-faith belief." See *Champ Corp.*, 291 NLRB 803, 803 (1988), *enfd.* 933 F.2d 688 (9th Cir. 1990), *cert. denied* 502 U.S. 957 (1991).

insight into the Respondent's motivation in discharging Taylor. The Respondent suspended both Hurdle and Stewart pending investigation into the charges leveled at them. The Respondent discharged them, however, without conducting any further investigation. The Respondent not only failed to perform a genuine investigation into the allegations against Hurdle and Stewart, but it failed to follow the procedure it said it would follow when it suspended them. This failure supports the finding that the Respondent acted out of a desire to rid itself of striking union activists, including Taylor, rather than an honest belief that the discharged employees had engaged in picket line misconduct.

Contrary to my colleagues' suggestion, I neither confuse the nature of the General Counsel's case nor require the Respondent to prove that Taylor committed the alleged misconduct. I simply require the Respondent to meet the standard of honest belief. The majority's application of that standard drains it of meaning. As applied by the majority, *General Telephone, supra*, would stand for the proposition that as soon as an employer has a report linking an employee to an allegation of misconduct, it may forego its customary investigative practices in order to avoid learning anything further, and then claim honest belief. *General Telephone* does not, however, compel such a position, nor should it be read in such a way as to turn "honest belief" into an empty phrase. In the circumstances presented here, the Respondent's unwillingness to make any inquiry that might

contradict Falcon's statement belies any claim it might otherwise have to an honest, good-faith belief in Falcon's report. The fact that the Respondent ultimately was able to prove the veracity of Falcon's statement at the hearing before the judge has no bearing on the bona fides of its belief at the time of the discharge.

2. The egregiousness of the conduct

Without minimizing the offensiveness of Taylor's conduct, it still must be analyzed within the framework of the Act. Taylor's conduct occurred while she was on the picket line in support of an economic strike, an activity protected by the Act. In that context, a certain amount of impulsive behavior is to be expected and must be tolerated so as not to discourage the exercise of Section 7 rights. See, e.g., *CKS Tool & Engineering, Inc. of Bad Axe*, 332 NLRB 1578, 1585-1586 (2000), and cases cited therein; *Shalom Nursing Home*, 276 NLRB 1123, 1137 (1985). Thus, any consideration of stripping Taylor of the protection of the Act must be undertaken carefully.

Taylor, in the presence of a resident's daughter, called the resident and the daughter a "bitch" and "a little piece of trash." Falcon is not a nonstriking employee, so the *Clear Pine Mouldings* standard – whether, under all the circumstances, Taylor's comments would reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act – does not directly apply. But *Clear Pine*

Mouldings states that an analogous test applies where a striker's statements are directed at nonemployees, such as Falcon.

Although Taylor's comments were extremely offensive, it is well established that such spontaneous picket line activity as the use of obscene and insulting language does not warrant the loss of an employee's reinstatement rights. See *Chevron U.S.A., Inc. v. NLRB*, 672 F.2d 359, 360 (3d Cir. 1982) (summarizing cases). Contrary to the majority's view, Taylor's language did not imply a threat that Taylor would mistreat Falcon's mother. To be sure, the language was disdainful of and insulting to both Falcon and Horan. But there was no suggestion, by word or gesture, of any action that Taylor intended to take toward either woman. In the absence of any such suggestion, the mere fact that Horan was an 82-year-old resident of the nursing home does not create a threat where there was none. Accordingly, the judge concluded correctly that Taylor's conduct did not warrant the denial of her reinstatement rights, and the Respondent violated Section 8(a)(3) of the Act by discharging her.

II. THE HIRING OF PERMANENT REPLACEMENTS

A. *Facts*

The strike began on November 17, 1999. Initially, the Respondent relied on nonstriking employees, managers, temporary employees, and volunteers to

fill in for the strikers. The Respondent commenced hiring permanent replacements on or about December 15, 1999. It hired a consulting firm to run a job fair to help it hire permanent replacements, at a cost of approximately \$16,000-\$17,000. In addition, the Respondent offered permanent jobs to temporary workers it had taken on since the beginning of the strike, agreeing to pay Class Act, one of the agencies supplying temporary employees, \$1100 per Class Act employee that it converted to permanent status. The Respondent also paid the replacements \$12.19 an hour, the wage rate for its most senior employees and substantially more than the "new hire" rate of \$10 an hour in the recently expired contract.

The Respondent admits that it decided not to inform the Union of its decision to permanently replace the striking employees. Scott Cohen, owner of Class Act, testified that the Respondent told him that its plans regarding permanent replacements were to be kept "hush-hush" and that it needed to get as many bodies hired as possible before the Union found out. Based on blind ads for jobs similar to those held by the strikers, the Union became suspicious that the Respondent was planning to hire permanent replacements. Around the end of December 1999, the Union received a report from someone who claimed that she was offered a permanent job with the Respondent. The Union then arranged for a meeting with the Respondent and a Federal mediator on January 3, 2000. At the January 3 meeting, the

Respondent admitted that it already had hired "over 100" permanent replacements.

On January 5, the Union sent the Respondent a letter offering on behalf of the strikers to "return to work immediately, as a group, and to continue working under the terms and conditions of the [expired] collective bargaining agreement . . . pending the negotiation of a successor collective bargaining agreement." Parker replied that same day by letter stating, *inter alia*, that "in reviewing your letter, it appears that it is not an unconditional offer but includes a number of preconditions including but not limited to" the retention of the expired contract's union-security clause and the apparent offer for either all or no employees to return to work "as a group." Parker asked the Union to advise her if her understanding was incorrect. The next day, the Union wrote to Parker advising that it was not insisting on the retention of the union-security clause. On January 20, 2000, the Union again offered on behalf of the strikers to return to work, this time with no stated conditions.

While these events were unfolding, on December 31, 1999, the Respondent's CEO, Norman Harper, sent a memorandum to the Respondent's board of directors. The memorandum, in pertinent part, reported that "as a well-executed surprise event the day before Christmas, we began to permanently replace striking workers at Avery. . . . So far, we have hired 104 permanent replacements at Avery, replacing 60% of those on strike. If [the Union] refuses to

seriously negotiate in good faith, we plan to add one or more permanent replacements each day. We have [the Union] in a real bind at Avery."

B. Analysis

An employer violates Section 8(a)(3) by failing to immediately reinstate striking employees on their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for failing to do so. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Capehorn Industry*, 336 NLRB 364, 365 (2001). That the positions claimed by the strikers are filled by permanent replacements constitutes a legitimate and substantial business justification. *Fleetwood Trailer*, *supra*; see *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). However, an employer will still be held to have violated the Act if, in hiring permanent replacements, it was motivated by "an independent unlawful purpose." *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964).

The issue here is whether the Respondent, in hiring permanent replacements, had an independent unlawful purpose of punishing the strikers and breaking the Union's solidarity by replacing a majority of its supporters. This is a case of first impression: the Board has never found the hiring of permanent replacements unlawful based on the *Hot Shoppes*

"independent unlawful motive" exception.⁴ Neither has it articulated the standard to be applied for proving the existence of such a motive. I turn first to the latter threshold issue.

The General Counsel contends that a *Wright Line*⁵ analysis should apply. Under that analysis, the General Counsel must first establish that union or other protected activity was a motivating factor in the employer's adverse employment action against an employee. If that is established, the burden shifts to the employer to show that it would have taken the same action in the absence of the protected activity. 251 NLRB at 1089. The judge rejected the General Counsel's contention, holding that the General Counsel must show that the "independent unlawful motive outweighed any legitimate and substantial business [justification] that the employer may have had." However, Board law is clear that *Wright Line* does apply where, as here, the respondent's motivation for taking the allegedly unlawful action is disputed. *Id.* Adhering to *Wright Line* but adapting it to the present context yields the following standard. Initially, the General Counsel has the burden of showing that

⁴ In a larger sense, this is really not a novel case. As the Fourth Circuit has explained, "The principle that otherwise lawful acts can be rendered unlawful when motivated by improper intentions is widely accepted and appears repeatedly throughout the law." *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 450 (4th Cir. 2002).

⁵ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

an independent unlawful purpose was a motivating factor in the employer's decision to permanently replace the economic strikers. If that is shown, the burden shifts to the employer to prove that it would have taken the same action even in the absence of any unlawful purpose.

The General Counsel sustained his initial burden. The Respondent's deliberate concealment of its plans, Harper's gloating memorandum referring to a "well-executed surprise event" and to placing the Union "in a real bind," and Cohen's testimony about a "hush-hush" program to replace as many strikers as possible before the Union found out, considered together, raise an inference that a desire to punish the strikers and break the Union's solidarity by permanently replacing a majority of its supporters was a motivating factor in the Respondent's decision.⁶ Bolstering this finding is the fact that the Respondent pursued this course of action at considerable economic cost to itself, paying Class Act a per capita fee of \$1100 to convert its temporary employees to permanent status, paying a consulting firm \$16,000-\$17,000 to run a job fair to attract permanent

⁶ The Respondent argues that the Board has never required an employer to provide advance notice to a union of its plan to hire permanent replacements. This argument misses the point. While the Respondent may not have been required to notify the Union, the fact that it was willing to go to great lengths to conceal its intentions is one factor, among others, supporting a finding that the decision to replace the strikers was motivated by an independent unlawful purpose.

replacements, and paying replacements well in excess of its existing wage rate for new hires.⁷

The General Counsel having sustained his initial burden, the burden shifted to the Respondent to show that it would have taken the same action of secretly hiring permanent replacements even in the absence of any unlawful purpose. To this end, the Respondent presented the judge and the Board with three reasons for its course of action: (1) to provide quality care to its residents; (2) to relieve its interim staff of long hours; and (3) to operate long-term at a lower cost. The record shows, however, that these were not the real reasons the Respondent secretly hired permanent replacements, but are mere pretexts.

First, unlike the replacements, the strikers knew both the residents and the work. The strikers, therefore, were the ones capable of immediately providing the quality of care the Respondent says it wanted. Indeed, both Harper and Parker testified that they would have preferred to have the strikers return to their jobs rather than to hire an entirely new work force unfamiliar with the Respondent's operation. Therefore, if the Respondent were truly concerned about the continuity of care, it would have disclosed its plan to the strikers in order to induce them to

⁷ Contrary to the majority's assertion, the evidence summarized above, ignored by the majority, does support a finding that the General Counsel sustained his initial burden of proving unlawful motive.

abandon the strike and return to work. Instead, the Respondent took pains to keep the hiring of permanent replacements a secret and thus acted in a manner inconsistent with a genuine desire to maintain quality care.

Second, the Respondent's claim of employee "burn-out" is contradicted by Harper's memorandum, which states that "[m]orale among staff and management remains high and determined." Thus, this alleged reason is not supported by the record.

Third, the Respondent's long-term cost analysis is mostly confined to showing that permanent replacements cost less than temporary workers. The Respondent also contends that permanent replacements would have cost less than what the Union was asking for at the bargaining table, but it does not contend that strikers returning to work under the terms of the expired contract would have been more costly than the replacements. Indeed, as explained above, it was just the reverse: permanent replacements cost more than less senior returning strikers would have and at least as much as the most senior returning strikers would have. Again, if the Respondent's true motive were to reduce costs, then it would have revealed its plan to permanently replace the strikers in order to induce them to return to work under the terms of the expired contract. Instead, it kept its plans secret, which virtually ensured that cost savings would not be realized.

Thus, the foregoing three reasons cannot be accepted as a truthful explanation of the Respondent's decision to secretly hire permanent replacements. By offering such transparently incredible reasons for its conduct, the Respondent not only failed to rebut the General Counsel's case, but actually bolstered it. "It is . . . well settled . . . that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

In its brief to the Board, the Respondent proffered a fourth reason for its secret plan: to obtain economic leverage over the Union in bargaining. However, the Respondent did not urge this fourth reason in its posthearing brief to the judge. In fact, at the hearing, the Respondent expressly disavowed any contention that it was motivated by a desire to gain an economic advantage over the Union.⁸ Where, as

⁸ When the Union's attorney asked whether the Respondent intended to argue that the replacement of the strikers was "simply a wake up call for the Union to begin bargaining seriously," the Respondent's attorney replied as follows: "Well I'll tell you that we are going to present evidence that the reason that we hired permanent replacements was because the temporary replacements were getting burned out. It's important to have continuity of care and the cost factor. Are we going to rely on a particular - are we going to say that it's a tactic to strong arm the union - no. Does that answer your question?" (Emphasis added.) Moreover, CEO Harper himself denied - not once, but

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here, an employer has shifted reasons for its actions, "an inference may be drawn that the real reason for its conduct is not among those asserted." *Sound One Corp.*, 317 NLRB 854, 858 (1995) (citation and internal quotation omitted), enfd. mem. 104 F.3d 356 (2d Cir. 1996).

Even assuming the bargaining-leverage rationale were properly before the Board, the Respondent's conduct still violated the Act under the test set forth in a series of Supreme Court decisions carefully balancing the conflicting legitimate interests of employers and employees in strike situations. In striking that balance, the starting point is that an employer's refusal to reinstate striking employees violates Section 8(a)(1) and (3) of the Act, *unless* the employer demonstrates that its refusal is based on "legitimate and substantial business justifications." *Fleetwood Trailer*, *supra*, 389 U.S. at 378, quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). The need to continue business operations is such a justification, and the employer that hires permanent replacements is presumed to have done so "to protect and continue his business by supplying places left vacant by the strikers." *Mackay*, *supra*,

twice - that gaining economic leverage was the motive. Asked why he had not considered telling the Union about the permanent replacements, Harper testified: "I didn't see it as a negotiating lever. My only focus was on the quality of services going forward in the future." Asked a second time, Harper reiterated: "Like I said previously, I just didn't see it as an option for leverage in negotiating."

304 U.S. at 345. In other words, the employer's limited right to refuse reinstatement to economic strikers is based on the presumption that such hiring is necessary to continue business operations. This presumption does not supercede the balancing of interests; on the contrary, it results from such a balancing. Permanently replacing strikers discourages union membership and concerted activity. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963). Nevertheless, the Court permitted employers to hire permanent replacements after engaging in the "delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." *Id.* at 229.

In sum, under the above test, the balance tips in favor of an employer that hires permanent replacements in order to continue operating its business. In that instance, the employer's legitimate and substantial business interest is held to outweigh the invasion of the Section 7 rights of the permanently replaced economic strikers. Here, however, the Respondent's alleged business justifications for hiring permanent replacements were not "legitimate" or "substantial"; they have been exposed as shams. Thus, there is nothing to put on the Respondent's side of the scale to balance against the damage to the Section 7 rights of the striking employees. Those rights necessarily

predominate, and the Respondent's failure to reinstate the strikers violated the Act.

The majority incorrectly characterizes the Respondent's covert scheme as an economic weapon. The Respondent's conduct was not economically motivated. On the contrary, the Respondent was successfully operating its business without permanent replacements. Harper admitted as much in his memo. The Respondent had no bona fide need to hire.⁹ Indeed, as explained above, the record shows that the reasons the Respondent advanced for hiring permanent replacements were pretexts. In reality, the Respondent's independently unlawful motive was to undermine the Union by engendering striker dissatisfaction with the Union. The intended result of the Respondent's actions was to force a majority of the strikers to endure the hardship of waiting an indefinite period of time after the end of the strike to

⁹ In this respect, the Respondent's conduct is akin to unit packing, which the Board has long held unlawful. See, e.g., *Airborne Freight Corp.*, 263 NLRB 1376 (1982), enf. denied on other grounds 728 F.2d 357 (6th Cir. 1984); *Suburban Ford, Inc.*, 248 NLRB 364 (1980), enf. denied 646 F.2d 1244 (8th Cir. 1981). Unit packing is the "egregious tactic of deliberately 'loading' the bargaining units so as to insure the abortion of any fair election, . . . in direct opposition to the congressionally declared national policy as set forth in the Act." *Suburban Ford, supra* at 373. The only difference between unit packing cases and this case is one of timing: in unit packing, the employer seeks to obstruct the formation of a bargaining relationship; here, the Respondent sought to subvert an existing bargaining relationship.

return to their jobs. The foreseeable result of that hardship would be hostility toward the Union for a perceived failure to protect the strikers' interests, thus driving a wedge between the Union and its formerly supportive members. This intended consequence, described in Harper's memorandum as the "bind" in which the Union was placed, reveals the Respondent's independently unlawful motive in secretly hiring permanent replacements in violation of Section 8(a)(3) of the Act.

My colleagues rely on *Central Illinois Public Service Co.*, 326 NLRB 928 (1998),¹⁰ to argue that employers are permitted to use economic weapons in order to win economic battles. That principle is undisputed, but irrelevant here. The Respondent's conduct has nothing to do with economic weapons. My colleagues' discussion of *Central Illinois* cannot mask the fact that they have failed to explain how the Respondent's secrecy is consistent with a motive to gain economic leverage.¹¹ Instead of explaining how a

¹⁰ Petition for review denied sub nom. *Local 702, Electrical Workers v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 (2000).

¹¹ Moreover, *Central Illinois* is distinguishable. In *Central Illinois*, the employer locked out employees. Lockouts must be disclosed. *Eads Transfer*, 304 NLRB 711, 712 (1991) ("[W]e conclude that an employer can only justify its failure to reinstate economic strikers for legitimate and substantial business reasons based on a lockout by its timely announcement to the strikers that it is locking them out in support of its bargaining position.") (internal quotations omitted), enfd. 989 F.2d 373 (9th Cir. 1993). Moreover, a lockout cannot be exploited to effect the

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secret hiring scheme could serve such a motive, my colleagues say that the Board has never held that the hiring of permanent replacements must be disclosed. In point of fact, as the judge noted, the Board has never expressed an opinion on the subject one way or the other. But, in any event, the Board's silence on the issue does not and cannot explain how the Respondent could have gained bargaining leverage from keeping the hirings secret. Harper understood that such leverage could only have been exerted through disclosure. Asked why he had not considered telling the Union about the permanent replacements, Harper testified that he "didn't see it as a negotiating lever." Indeed, despite their assertions to the contrary, my colleagues tacitly admit the same point.

permanent replacement of strikers. See *Harter Equipment*, 293 NLRB 647, 648 (1989). Under the majority's holding today, however, a resourceful employer – i.e., one that successfully keeps its permanent replacement project hidden beneath a veil of secrecy – may circumvent this inconvenient limitation attendant upon lockouts.

Citing, inter alia, *Eads Transfer*, the majority attempts to manufacture a specious legitimacy for the Respondent's conduct by claiming that the Respondent promptly disclosed its hiring of permanent replacements after the strikers offered to return to work. That is not what happened. What happened was that the Union got wind of what the Respondent was up to, and the Respondent admitted its secret hiring scheme when the Union confronted it in the presence of a Federal mediator. The Respondent's admission in this regard was not an *Eads*-like disclosure, but simply a rueful acknowledgment that the secret was out. In the meantime, the Respondent had surreptitiously hired over 100 permanent replacements, representing more than half the positions in the bargaining unit.

They say that "if the hiring of replacements persuaded some employees that further striking was unwise, that would inure to the bargaining benefit of the employer." But striking employees could only be thus persuaded *if they knew their employer was hiring permanent replacements*. Here, by contrast, the Union and strikers were deliberately kept in the dark. Harper testified truthfully when he denied a motive to gain leverage in collective bargaining. In truth, the Respondent's conduct is intelligible only in light of a purpose to punish the strikers for their protected activity and subvert the Union.

The majority seeks to salvage its "economic leverage" rationale by drawing a distinction between the Respondent's decision to hire permanent replacements and its decision to do so *secretly*, and then defending the former but not the latter as motivated by a purpose to gain economic leverage: "[W]e are finding only that a purpose of the hiring of replacements was to gain economic leverage. We are *not* saying that the failure to disclose had that purpose." Again, however, my colleagues miss the point: *undisclosed, the hiring of replacements exerted no economic leverage*.

Speaking in the abstract, the majority says that hiring replacements gains "an employer" an economic advantage, regardless of whether the union knows of that hiring or not, because replacements enable operations to be maintained during a strike. The issue, however, is not what might motivate a hypothetical employer, but what motivated the

Respondent. My colleagues do not contend, and there is no evidence, that the Respondent's secret hiring scheme was motivated by a need to maintain operations. On the contrary, as stated above, the Respondent was successfully operating its business during the strike without permanent replacements. Therefore, the majority's theoretical argument does not explain the Respondent's decision to secretly hire permanent replacements.

In sum, the General Counsel has satisfied his burden of showing that a desire to punish the strikers and break the Union's solidarity was a motivating factor in the Respondent's decision to secretly hire permanent replacements. The Respondent, however, has failed to show that it would have taken the same action even in the absence of any unlawful purpose. Accordingly, the judge correctly found that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate all the strikers upon their unconditional offer to return to work.

The final remaining issue is the date on which the Union made that unconditional offer on the strikers' behalf. The judge found that the Union's January 5, 2000 offer was conditioned on the maintenance of the terms and conditions of the expired contract. He concluded that the Union's January 20, 2000 offer to return was the first unconditional offer, and that the Respondent violated the Act by its refusal to reinstate all of the strikers at that time.

The January 5 offer to return to work was a conditional offer because, as Parker pointed out in her reply on that same date, the expired contract contained a union-security clause that did not survive contract expiration.¹² On January 6, 2000, the Union advised Parker that it was not insisting on the retention of the union-security clause. The Union's January 6 letter served as a clarification to its January 5 offer, making it clear that it was not insisting on the continued application of contract terms that did not lawfully survive contract expiration. Therefore, the Union made an effective, unconditional offer to return to work on behalf of the striking employees on January 6, 2000. The Respondent's liability for its failure to reinstate all striking employees runs from that date.

ALJ:

MICHAEL A. MARCIONESE

ALJ-DECISION:

[EDITOR'S NOTE: THE PAGE NUMBERS OF THIS DOCUMENT MAY APPEAR TO BE OUT OF SEQUENCE; HOWEVER, THIS PAGINATION

¹² Parker also challenged the January 5 offer because it was an offer for the strikers to return "as a group," displacing the permanent replacements. However, since the hiring of those permanent replacements was unlawful under *Hot Shoppes, supra*, the Respondent was obligated to accept the returning strikers as a group, displacing its replacement employees as necessary. Thus, the offer to return "as a group" did not make the offer conditional.

ACCURATELY REFLECTS THE PAGINATION OF
THE ORIGINAL PUBLISHED DOCUMENTS.]

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Hartford, Connecticut on March 13-15, 19, 23 and 26-28, 2001. New England Health Care Employees Union, District 1199, AFL-CIO (the Union) filed the charge on February 17 and amended it on July 31, 2000.¹ The complaint issued on November 29, alleging that the Respondent, Church Homes, Inc. d/b/a Avery Heights, violated Section 8(a)(1) (3) and (5) of the Act. On December 12, the Respondent filed its answer to the complaint denying the unfair labor practice allegations and raising affirmative defenses.

The allegations in the complaint arose out of a strike engaged in by the Respondent's employees represented by the Union. The strike commenced on November 17, 1999 and ended when the Union made an unconditional offer to return to work in January. There is no dispute that the strike was at all times an economic strike. The following issues are framed by the pleadings:²

¹ All dates are in 2000 unless otherwise indicated.

² In its answer, the Respondent asserted as an affirmative defense that the strike had an unlawful purpose and was
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1. Whether the Respondent violated Section 8(a)(1) and (3) of the Act by terminating employees Opal Clayton, Patricia Hurdle, Georgia Stewart and Pauline Taylor for alleged misconduct on the picket line.

2. Whether the Respondent violated Section 8(a)(1) and (5) of the Act by misrepresenting to the Union its intentions regarding the hiring of permanent replacements for striking employees.

3. Whether the Section 8(a)(5) allegation is time-barred by Section 10(b) of the Act.

4. Whether the Respondent had an independent unlawful motive in hiring permanent replacements for its striking employees, thereby violating Section 8(a)(1) and (3) of the Act when it refused to reinstate those economic strikers who had been replaced.

On the entire record³, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent and the Charging Party, I make the following

unprotected. The Respondent did not pursue this claim in its brief.

³ The General Counsel's unopposed motion to correct the transcript is hereby granted.

Findings of Fact

I. Jurisdiction

The Respondent, a not-for-profit corporation, provides skilled and semi-skilled health care services at its facility in Hartford, Connecticut, where it annually derives gross revenues in excess of \$100,000 and purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *Background*

Church Homes, Inc. owns and operates several facilities in Connecticut serving the elderly and infirm. The sole facility involved in this proceeding is the Avery Heights facility in Hartford, Connecticut. That facility consists of a skilled nursing facility, assisted living residences, independent living cottages and adult day care. The facility is home to approximately 500 older adults who need various levels of care. Norman Harper was the Chief Executive Officer and Dr. Miriam Parker the Administrator during the period relevant to these proceedings.

The Union has represented a unit of service and maintenance employees at the Avery Heights facility since the mid-1970s. Unit employees work in all areas. The largest category of unit employees is certified nursing assistants (CNAs). The most recent collective-bargaining agreement was effective from November 1, 1995 through October 31, 1999. Agreement was reached on this contract after a five-week strike. This was the first significant work stoppage in the history of the parties' relationship. According to Union president Jerry Brown, the parties had a relatively harmonious and productive relationship until 1995. As noted above, the Union commenced another strike on November 17, 1999, when the parties failed to reach agreement on a new contract. At the time of the strike, there were 180-185 employees in the unit.

The Union represents approximately 19,000 employees in the State of Connecticut, employed in private and public sector health care institutions. At the time of the hearing, the Union had collective bargaining relationships with 71 nursing homes, which represented 27-28% of the homes in the State. It is undisputed that the Union has tried over the years to negotiate common wages and benefits at all the facilities it represents. To achieve this result, the Union had five "pattern agreements" which it sought from respective employers on an individual basis depending on the maturity of the bargaining relationship. Until 1995, the Respondent was party to an agreement consistent with the pattern for the most

mature relationships, providing for the highest level of wages and benefits. In 1995, the Respondent entered negotiations intent on breaking away from the pattern. Following the five-week strike, the Union was forced to accept an agreement that departed from its pattern in significant respects. In addition, by negotiating a 5-year agreement, the Respondent was able to separate itself from other employers whose contract expiration dates coincided. The Union generally sought common expiration dates to put increased pressure on the employers by holding out the threat of massive strikes affecting thousands of nursing home residents occurring at the same time. This strategy also gave the Union leverage to obtain increased public expenditures for nursing homes in the state legislature.⁴

During the term of the 1995 contract, the Respondent terminated two union delegates, Margarita Cortavarria and Pauline Taylor, for alleged patient abuse. The Union pursued grievances on behalf of both employees to arbitration. The arbitrators sustained the termination of Cortavarria, but ordered Taylor reinstated without backpay. The Union also filed a number of unfair labor practice charges against the Respondent which were deferred to the

⁴ Most nursing homes receive approximately 70% of their revenue through Medicaid and Medicare reimbursement from the government. Because the Respondent's facility was not exclusively a nursing home, less than a quarter of its revenue came from such sources.

parties contractual grievance/arbitration machinery pursuant to the Board's decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971). In October 1998, the union was certified as the representative of a unit of service and maintenance employees at Miller Memorial in Meriden, Connecticut, a skilled nursing facility that was managed by the Respondent for a charitable foundation. In addition, in the fall 1998, the pattern agreements that the Union had negotiated with other homes in 1995 were due to expire. The Union was able to extend about 50 of those contracts into the spring 1999 and began an intense lobbying campaign to convince the State legislature and governor to appropriate more money for nursing home reimbursements that would fund higher wages and benefits for the employees it represented. This campaign was successful, resulting in a \$200 million appropriation in the State budget for Medicaid reimbursement, which was specifically designated for increases in wages and benefits. Following this appropriation, the Union negotiated new pattern agreements with other facilities that included substantial increases in wages and benefits. As a result, the wages and benefits in the Respondent's contract fell further behind the pattern typical for employers with such a mature relationship. The pattern agreements that the Union negotiated in the spring 1999 were 2-year agreements set to expire in March 2001.

After the Union reached agreement with the other facilities in the State, Union President Brown requested a meeting with the Respondent's CEO

Harper. This meeting occurred in July 1999 at a restaurant in Hartford. Only Brown and Harper were present. Brown testified that he told Harper that the State's increase in Medicaid reimbursement rates "changed the landscape" for the upcoming negotiations. Harper disagreed, telling Brown that the State's action would have very little impact on the Respondent because so little of its revenue came from Medicaid. Brown then outlined for Harper the economics of the recently-negotiated pattern agreements. According to Brown, Harper said that he did not expect the economics to be a problem for the Respondent. Brown also raised the issue of the two discharged delegates, who were awaiting arbitration. According to Brown, Harper responded by saying that, while he might be able to work something out for Cortavarria, he never wanted to take Taylor back, that he didn't like her as a human being. According to Brown, the meeting ended on a cordial note, with Harper telling Brown that he did not want a fight with the Union. Harper also promised to get back to Brown regarding a possible settlement of Cortavarria's case.

Harper was not specifically asked about this meeting on direct examination. On cross-examination by the Charging Party's counsel, Harper acknowledged having such a meeting with Brown but denied telling Brown that the economics of the new pattern agreement would not be a problem. According to Harper, what he told Brown at this meeting is that the Respondent was looking for essentially the same

contract it then had with a "reasonable improvement on the paycheck economics." Harper also denied, on cross-examination, that he made the statement about Taylor that Brown attributed to him. According to Harper, when Brown raised the issue of the two discharges, he told Brown that his administrator and department heads were the key people involved and that he was not in a position to overrule their decision.

Negotiations for a new contract began on September 23, 1999. There were approximately 8 or 9 meetings before the strike commenced on November 17, 1999. The Union was represented by a large negotiating committee comprised of employees, with Union staff members Almena Thompson and Louis Guida serving as spokespersons. Neither testified at the hearing. Administrator Parker, and Attorney Thomas Cloherty represented the Respondent. Parker and Cloherty testified at the hearing. The Union's initial proposal called for a 16-month term, with an expiration date in March 2001 to coincide with that of its other contracts with Connecticut nursing homes. The Union's initial economic proposal would have returned the Respondent's wages and benefits to the pattern agreement. The Respondent, in contrast, proposed a 7-year contract and only modest improvements in wages and benefits, which would place the Respondent's employees even further behind other union-represented employees in the State. The Respondent also proposed other changes in the contract, such as elimination of a "free meal" for

employees, reduction in the uniform allowance and termination of the Respondent's contribution to the Union's training fund, which could be perceived as regressive. Brown did not attend negotiations until the last meeting before the strike, on November 16. At this meeting, Brown proposed a three-year contract with a re-opener in March 2001. The Respondent had modified its proposal on duration to 6 years. The parties were still far apart on economics, as well as some language items. There is no allegation in the complaint that the Respondent bargained in bad faith with the Union prior to the strike.

During the strike, the parties had several meetings, on and off the record, some with the assistance of the federal mediator and others with the Mayor of Hartford, but no agreement was reached. In addition, Brown and Harper met again at the same restaurant on December 15, 1999. What occurred at this meeting will be discussed in more detail later as it forms the basis for much of the General Counsel's theory of the case and requires a credibility resolution. As of the date of the hearing in this case, the parties had not met for negotiations since March 2000.

The Union's negotiations with the Respondent occurred simultaneously with its negotiations with the sister facility, Miller Memorial. A different attorney from the same law firm represented Miller in those negotiations. Although the Union tried to coordinate bargaining with both facilities, the Respondent kept the negotiations separate. Nevertheless, the Union commenced a strike at Miller on the

same day, November 17, 1999. The Union also ended both strikes at the same time. There is no allegation that the Respondent violated the Act with respect to the unit at Miller Memorial. It appears from the evidence in the record here that the Respondent reinstated all of the strikers at Miller.

The strike at the Respondent's facility formally ended either on January 5, when the Union offered to return to work as a group under the terms of the expired contract, or on January 20, when the union made an offer without any conditions or limitations.⁵ Only after the second offer did the Respondent reinstate some of the striking employees. At a meeting with the mediator on January 3, the Respondent told the Union for the first time that it had hired more than 100 permanent replacements for striking unit employees. The Respondent had not hired permanent replacements during the 1995 strike, despite distributing literature to the employees before that strike advising them of this risk, and it did not hire any permanent replacements for striking employees at Miller Memorial. As of the hearing, the Respondent had reinstated approximately 78 of the striking employees.

⁵ The issues regarding when the Union unconditionally offered to return to work will be addressed in a later section of this decision.

B. Termination of Strikers for Alleged Misconduct

The Board applies a two-part analysis to cases like this where the issue is whether an employer may lawfully refuse to reinstate or terminate a striker on the basis of alleged strike misconduct. As summarized by the Board in *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999):

First, under the standard in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986), an employer may lawfully deny reinstatement to a striker whose strike misconduct under the circumstances may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. Second, under the framework for analysis in *Rubin Bros.*, 99 NLRB 610 (1952), *General Telephone Co.*, 251 NLRB 737 (1984), and *Axelson, Inc.*, 285 NLRB 862 (1987), once the General Counsel has initially established that a striker was denied reinstatement for conduct related to the strike, the burden of going forward with the evidence shifts to the employer to establish that it had an honest belief that the striker in question engaged in the strike misconduct. If the employer establishes that, then the burden of going forward shifts back to the General Counsel to establish that the striker in question did not in fact engage in the alleged misconduct.

See also *Champ Corp.*, 291 NLRB 803, 806 (1988), enfd. 933 F.2d 688 (9th Cir. 1990). This analytical framework is consistent with the Supreme Court's decision in *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), holding that an employer who terminates an employee in the mistaken belief that misconduct occurred in the course of protected activity violates the Act, even where the employer is acting in good faith on that mistaken belief. The Board, in *Siemens*, *supra*, explicitly stated that it is inappropriate to analyze these cases under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

1. Opal Clayton, Patricia Hurdle and Georgia Stewart

Clayton, Hurdle and Stewart were all employed prior to the strike as full-time CNAs on the day shift. Stewart had been employed by the Respondent for 24 years and Hurdle even longer. Parker acknowledged that they were two of the three most senior employees in the unit. Clayton had been employed by the Respondent for about 3 years. All three were active members of the Union, each serving as a picket captain during the 1999 strike. Clayton had been an elected union delegate since 1998, representing employees in disciplinary interviews and at the initial stages of a grievance. There is no evidence in the record that any of these employees had disciplinary issues before the strike. On the contrary, Parker

conceded that at least one of them, Stewart, was a very good caregiver.

Hurdle and Stewart were among the first strikers to be recalled after the Union made its January 20 offer to return to work. Each received a letter dated January 21 instructing her to report for work on January 25. Although both employees arrived at the Respondent's facility on time and dressed for work, they were not permitted to start work. Instead, each was told that she would have to first meet with Barbara Brigandi, the Respondent's director of nursing, and Parker. Stewart was the first to meet with Brigandi and Parker. According to Stewart, Parker opened the meeting by telling Stewart that there might be a problem with something she did on the picket line. When Stewart asked what it was, Parker at first would only tell her that a family member of a resident had accused her of something. On further questioning by Stewart, Parker finally disclosed the identity of the accuser, telling Stewart that Mr. Richards said that Stewart had been mimicking his mother on the picket line. Parker did not give Stewart any other details, such as the date and time this occurred, the identity of any others involved, or the specific conduct which purportedly mimicked Sara Richards. Stewart admittedly became upset and angry. She told Parker that if she knew this was going to happen, she could have had her union representative, Almena Thompson, with her. Parker told Stewart that the Respondent was going to investigate

the incident so they could get Stewart back to work as soon as possible.

Hurdle encountered Stewart as she was leaving Brigandi's office, but they did not have time to speak to one another. Only Brigandi was present when Hurdle first entered the office, but Dr. Parker joined them shortly. Parker started the meeting by telling Hurdle that she could not let her work that day because of something that happened at the picket line. Parker told Hurdle that a family member had complained about a gesture Hurdle made on the picket line. When Hurdle indicated that she would like to know who complained, Parker told her it was Richards. No other details of the alleged misconduct were given. According to Hurdle, she responded to this news by saying to Brigandi, "[Y]ou know we've been having problems over the years, little problems, but you know I never got into it with family or family members. You know I wouldn't do that." Brigandi did not respond. Parker told Hurdle that the Respondent had to investigate and that Hurdle had to go home. Hurdle asked why they made her come to work if they knew they were going to do this. Parker responded that the Union knew.⁶

⁶ Hurdle had not been told anything by the Union before she reported to work on January 25. Stewart testified that the night before, she spoke to Thompson who told her that there might be a problem when she went to work the next day. Thompson did not tell her what the problem was and Stewart surmised that it was probably something similar to the return

(Continued on following page)

Parker testified for the Respondent about her meetings with Stewart and Hurdle, generally corroborating their testimony. In particular, she acknowledged providing few specifics as to the nature of the misconduct and that she was reluctant to reveal the identity of the accuser. Parker also admitted that both Stewart and Hurdle denied engaging in any conduct toward a family member. Parker's testimony did differ from that of the employees in several respects. She testified, for example, that both employees were asked if they wanted a union delegate and both refused. I find this not to be credible in light of the fact that Hurdle and Stewart were long-time union members who were unlikely to decline such an offer in the face of a meeting like this. Parker also testified that she left the meeting with Hurdle for a moment and returned to hear Hurdle telling Brigandi, "If it was, it was only gestures." Parker then offered hearsay testimony regarding what Brigandi told her Hurdle said while Parker was out of the room. Parker admitted she was not present for the conversation that preceded Hurdle's statement about "gestures". Brigandi, who was still employed by the Respondent at the time of the hearing, did not testify. The Respondent offered no explanation for her absence. I shall therefore disregard Parker's hearsay

from the last strike when it took several days to get everybody back in his or her right positions.

testimony about the conversation between Brigandi and Hurdle.⁷

The next time Hurdle and Stewart heard from the Respondent was several days later when they received termination letters dated January 26. Each received an identical letter signed by Parker that read:

We have conducted an investigation regarding a reported event of your violation of policy of Avery Heights.

The act of mimicking and ridiculing a resident's mannerism and behavior is a direct violation of a resident's right to dignity and respect. Each resident has the right to be treated with consideration, respect and full recognition of his/her innate value as a human being. Each employee, in turn is charged with the obligation to act with respect and sensitivity to our residents, families and friends. You have intentionally violated this standard.

You are hereby notified that as of January 26, 2000, you are terminated from your employment at Avery Heights for mimicking the behavior of a frail, cognitively impaired resident in front of her son as he exited Avery Heights.

⁷ Hurdle denied making the statements that Parker claims Brigandi reported to her.

Parker admitted that she conducted no further investigation between her meetings with Hurdle and Stewart and the drafting of these letters.

According to Hurdle and Stewart, they did not learn the details of their alleged misconduct until they went to the unemployment office for a hearing on February 17. At this hearing, they were told that Richards had complained that Hurdle, Stewart and another employee, Clayton, had mimicked his mother, Sara Richards, by raising their hands and shouting, in unison, "help me, help me". Mrs. Richards is known to repeatedly call out in such a fashion. They also learned for the first time that this incident occurred on November 19, 1999, the third day of the strike.

Although Clayton was identified at the unemployment hearing as being a participant in this conduct, she had not yet been terminated. On the contrary, in response to the Union's January 20 offer to return to work, Clayton had received a letter from the Respondent notifying her that she had been permanently replaced and her name placed on a preferential rehire list. After Hurdle's and Stewart's unemployment hearing, Clayton received a termination letter signed by Parker and dated February 22, which is identical to the letters sent to Hurdle and Stewart. There is no dispute that neither Parker nor any other representative of the Respondent spoke to Clayton about her alleged misconduct before sending this letter.

Parker testified that she and Brigandi made the decision to terminate Clayton, Hurdle and Stewart. According to Parker, they were terminated because they mimicked and mocked the behavior of a resident in front of her son while he was waiting to exit the facility on November 19. Parker learned of this conduct in December from a nurse whose identity she could not recall. This nurse told Parker that there had been an issue with Richards on the picket line that involved a violation of residents' rights. Upon receiving this report, Parker "made up [her] mind to chat with Richards about it the next time she saw him." Although Parker could not recall how much time passed after receiving this report, she recalled seeing Richards and speaking to him about it during the holiday season. Richards told Parker that, as he was waiting to exit the facility one day, Clayton, Hurdle and Stewart, in unison, mimicked his mother's cries of "Help me! Help me! Help me!". Parker asked Richards to provide a written statement of the incident. He agreed to do so and a statement was prepared by the Respondent's social worker. This statement is neither dated nor signed by Richards. The statement reads in its entirety:

During the week of November 17, as I was waiting to exit the facility in the driveway, three nursing assistants (Opal Clayton, Pat Hurdle and Georgia Stewart) saw me in my car and the following occurred:

They stopped and turned toward me and raised their hands and said "Help me, help

me, help me!" imitating my mother. It made me feel very sad and depressed and angry and uncomfortable in my concern not only for their current attitude toward their participation in the strike and their relationship with the nursing home, but also my concern for their return to their jobs caring for my mother when they come back. They were the team that cared for my mother on the floor. My mother will be in a position where after this strike she is taken care of by people who have rendered their true attitudes toward my mother apparent, an attitude that shows no respect for resident rights.

Parker testified that she did not do anything with this statement at the time because she saw no need for urgency since the employees were still on strike. In fact, she did nothing about the incident until after the Union made its offer to return to work. That is when she spoke to Hurdle and Stewart. Parker admitted that she conducted no further investigation before making her decision to terminate Hurdle and Stewart. Parker also admitted that she did not speak to Clayton at all before terminating her. According to Parker, there was no need for any further investigation because Richards "was meticulous in his detail of what occurred and [she] believed him."

The Respondent called Richards to testify about the incident. He confirmed giving the statement to Dr. Parker, as described above, but had no explanation for not signing the statement. Richards gave a

more detailed account of the incident than that which appears in his statement. According to Richards, at about 10:30 a.m. on November 19, 1999, his was the first car in line waiting to exit the Respondent's driveway as the strikers picketed. He had his window rolled up. He was leaving the facility after dropping off Desirene Kelly, a nonstriking employee of the Respondent who also worked as a private duty companion for Mrs. Richards. He recognized Clayton, Hurdle and Stewart as three aides who worked on the floor where his mother resided, although none of them were her regular caregivers. Richards recalled observing the three employees pass his car three times from west to east. He recalled that the three appeared to take note of him and then, on the next pass, stopped, looked directly at him, raised their arms and yelled "help me, help, help me", then continued. Richards immediately perceived that the three employees were mimicking his mother. He testified on cross-examination that he was certain of the identity of the three employees because he knew them from his frequent visits to the facility and their conduct stood out because it was so startling. Although he recalled that there were approximately 25 picketers on the line at that time, he saw only Clayton, Hurdle and Stewart engage in this conduct.

Clayton, Hurdle and Stewart each emphatically denied engaging in the conduct described by Richards. They were corroborated to some degree by a number of other strikers who testified that they were on the picket line on November 19, 1999 with

Clayton, Hurdle and Stewart and did not see them mimic Mrs. Richards. The General Counsel and the Charging Party also attempted to cast doubt on the credibility of Mr. Richards by offering testimony that Stewart and Hurdle were wearing clothing that would render them unrecognizable because it was so cold on the picket line that morning.⁵ Clayton, Hurdle and Stewart, as well as the other strikers who testified, did acknowledge singing and chanting as they walked the picket line. One of their chants involved raising their arms while shouting "up with the Union", then lowering their arms and shouting "down with the boss." Richards denied hearing any such chants during the many times he crossed the picket line.

Although the Respondent had hired a security firm to videotape incidents on the picket line, it is undisputed that no videotaped evidence of this incident exists. Hurdle, Stewart and other striking employees who testified for the General Counsel testified that the guards appeared to be videotaping

⁵ Certified records from the National Climatic Data Center that are in evidence show that the air temperature in Hartford was 51 degrees with winds blowing at 11 knots at 10:00 AM on November 19, 1999. By 11:00 a.m., the temperature had risen two degrees but the wind was still blowing at a brisk 9 knots. The wind chill would have made it feel much colder than 51-53 degrees. Moreover, the strikers had been on the picket line at least since 7:00 AM when the wind chill was 30 degrees. Under these conditions, it would not surprise me to find at least some strikers bundled against the cold.

all the time. The Respondent's witnesses, including one of the guards who worked for the Respondent's security contractor during the strike, Doug Miller, disputed this. According to Miller and Parker, the guards were instructed only to videotape when Dr. Parker or another supervisor were exiting, or when an "inappropriate incident" occurred. The determination whether an incident should be videotaped was apparently left to the discretion of the guards.

The Respondent relies on the testimony of Richards to establish that Clayton, Hurdle and Stewart were lawfully terminated, arguing that this case comes down to the question whether Richards or the three terminated employees are lying. The issue is not as simple as the Respondent would frame it. Because there is no dispute that Clayton, Hurdle and Stewart had engaged in a strike and were terminated for conduct related to the strike, the Respondent had the burden of going forward with evidence to establish that it had a honest, good-faith belief that the employees engaged in misconduct serious enough to warrant the denial of reinstatement. Resolution of this question does not turn on the credibility of Richards. It is the credibility of Dr. Parker, and her belief that the employees engaged in misconduct, that is essential to the Respondent meeting its initial burden. Resolution of that question turns on the information she had available at the time she made the decision and the process she used to arrive at that decision.

When Dr. Parker decided to terminate Hurdle and Stewart on January 26, all she had available was the unsigned and undated statement of Richards and the denials by Hurdle and Stewart that they had mimicked Richards' mother on the picket line. Although Dr. Parker told both employees that they were being placed on administrative leave pending an investigation, she admits conducting no investigation. By the time Dr. Parker decided to terminate Clayton, she had the benefit of additional information that was presented at the unemployment fact-finding hearing, but she had not yet provided Clayton with an opportunity to respond to Richards accusation.⁹ The process Dr. Parker followed in deciding to terminate three employees, including two of its most senior CNAs, differed from the procedure employed before the strike when the Respondent sought to terminate an employee for misconduct.

Dr. Parker testified that she chose to believe Richards rather than the employees because he was "meticulous in his detail." While Richards was meticulous in testifying about the incident at the hearing, the brief unsigned statement he provided to Dr. Parker in December 1999, relatively close to the event, was devoid of specifics. Dr. Parker's haste in

⁹ Although Clayton was given the opportunity to "make a statement" at a grievance meeting she attended with Suzanne DeCourcy, the Respondent's Director of Employee Development, in March, this occurred after Clayton had already been terminated.

accepting Mr. Richards statement as proof of misconduct, in the face of Hurdle's and Stewart's denials and without even questioning Clayton, demonstrates that the Respondent did not terminate these three employees because it had a "good-faith belief" they engaged in misconduct. Before making her decision, Dr. Parker made no effort to determine whether Richards might have been mistaken in his perception of what occurred, or might have identified the wrong employees as having been involved. Dr. Parker did not even take the time to review the videotapes that had been taken in the first week of the strike to see if there was any objective evidence to corroborate Richards account.

My finding that Dr. Parker was not acting in good faith when she made her decision to terminate these employees is sufficient to establish a violation of the Act.¹⁰ *Champ Corp., supra*. Even assuming that the Respondent had met its initial burden, I would still find a violation of the Act here. I do not doubt that Richards sincerely and honestly believed that he saw three CNAs mimic his mother on the picket line

¹⁰ I have also drawn an adverse inference from the Respondent's unexplained failure to call Brigandi as a witness. Because she is still employed as the Respondent's Director of Nursing and was present for the meetings with Hurdle and Stewart and made the decision with Dr. Parker, she is a witness who would be expected to testify favorably for the Respondent. Because she did not testify, I must infer that her testimony would not have corroborated Dr. Parker. *Grimmway Farms*, 314 NLRB 73, fn. 2 (1994).

and that he was convinced that Clayton, Hurdle and Stewart were the three employees involved. At the same time, I believe the sworn testimony of Clayton, Hurdle and Stewart that they did not engage in such conduct. In reaching this conclusion, I attach no weight to the purportedly corroborative evidence of the other striking employees, including the testimony regarding the weather conditions on November 19. My decision to credit the three employees' denial is based instead on factors such as their length of employment with the Respondent as caregivers, the absence of any history of engaging in conduct that was in disregard of residents' rights, and the presence of guards with video cameras near the picket line when the incident allegedly occurred. It simply strains credulity to believe that these three women would engage in such offensive conduct directed at a resident or her family.

I agree with the Respondent that the conduct described by Richards is patently offensive and should not be condoned. However, even if Clayton, Hurdle and Stewart engaged in this conduct, it would not be sufficient under current Board law to deny them their reinstatement rights. The Board and the courts have long recognized that impulsive behavior is to be expected on the picket line and that not every impropriety committed during a strike deprives an employee of the Act's protection. See *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977) and cases

cited therein.¹¹ Over the years, the Board has attempted to draw the line between "situations where employees exceed the bounds of lawful conduct in a moment of exuberance or in a manner not activated by improper motives and those flagrant cases in which the misconduct is violent or of such serious character as to render the employees unfit for further service." *J.W. Microelectronics Corporation*, 259 NLRB 327 (1981). Accord: *Shalom Nursing Home*, 276 NLRB 1123, 1137 (1985). In *Clear Pine Mouldings, Inc.*, *supra*, the Board enunciated the test for determining whether verbal conduct is sufficient to warrant an employee's loss of reinstatement rights. The Board held that it would determine "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." 268 NLRB *supra* at 1046. Accord: *Briar Crest Nursing Home*, 333 NLRB 935 (2001).¹² The Board held further that it would apply an analogous test to the assessment of strikers' verbal and nonverbal conduct directed against persons who do

¹¹ The Court of Appeals denied enforcement of the Board's order in *McQuaide* (220 NLRB 593) because it rejected the view that a verbal threat alone could never be sufficient to warrant denial of reinstatement. There is no contention that Clayton, Hurdle or Stewart verbally threatened Mr. Richards or anyone else during the strike.

¹² Although *Clear Pine Mouldings* and *Briar Crest* involved verbal threats, the Board has applied this test to other forms of verbal conduct. See *Shalom Nursing Home*, 276 NLRB *supra*, at fn. 3; *Catalytic, Inc.*, 275 NLRB 97 (1985).

not enjoy the protection of Section 7 of the Act. 268 NLRB *supra* at 1046, fn. 14.

Applying the *Clear Pine Mouldings* test to the conduct at issue here, I find that the alleged mimicking of Mrs. Richards was not sufficiently egregious to warrant denial of reinstatement. The alleged misconduct here is similar to conduct, i.e., the taunting of a physically handicapped employee and the crude remarks made when the husband of a nonstriking employee died suddenly near the picket line, which the Board found was not sufficient to warrant denial of reinstatement in *Shalom Nursing Home, supra*. In that case, the administrative law judge rejected an argument that employees who work in patient care should be held to a higher standard when evaluating striker misconduct. I agree with the judge in that case that there is "no basis for adopting a special standard as there is no basis to find that nursing home employees are of a higher moral character than other people." *Id.* at 1137, fn. 17.

Accordingly, based on the above, I find that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint, by terminating Patricia Hurdle and Georgia Stewart on January 26, 2000 and by terminating Opal Clayton on February 22, 2000.

2. Pauline Taylor

Taylor has been employed by the Respondent for 8 years as a CNA. She has been a union delegate since 1992, has served as one of the Union's two

chapter officers and was a picket captain for both the 1995 and 1999 strikes. As noted above, the Respondent terminated Taylor in 1998, but she was reinstated without backpay in August 1999 as a result of an arbitration award. Taylor joined the strike on November 17, 1999 and picketed every day in the first week. Taylor testified that she had a motor vehicle accident on Thanksgiving day, November 25, 1999, which caused her significant pain and injuries lasting to the present day. According to Taylor, she did not go to the picket line after her accident, except for one brief visit around Christmas, for the remainder of the strike. After the Union made its unconditional offer to return to work in January, Taylor received a letter from the Respondent notifying her that she had been permanently replaced but would be placed on a preferential hiring list for vacancies. About 1 month later, Taylor received the following letter from the Respondent, dated February 22 and signed by Brigandi, the director of nursing:

We have conducted an investigation regarding a reported event of your violation of policy of Avery Heights.

The act of cursing and insulting a resident is a direct violation of a resident's right to dignity and respect. Each resident has the right to be treated with consideration, respect and full recognition of his/her innate value as a human being. Each employee, in turn is charged with the obligation to act with respect and sensitivity to our resident, families

and friends. You have intentionally violated this standard.

You are hereby notified that as of February 22, 2000, you are terminated from your employment at Avery Heights for cursing and insulting a frail, physically impaired resident and her family member as the family member passed through the picket line at Avery Heights.

Taylor testified that this letter was her first notification that the Respondent believed she had engaged in misconduct on the picket line. Taylor did not learn the details of the alleged misconduct until she attended a negotiation session at the offices of the Federal Mediation and Conciliation Service (FMCS) in March. At that meeting, Union president Brown asked the Respondent's spokesman, Attorney Cloherty, why Taylor had been terminated. Brown also asked for the date of the incident and whether there was any video or audio tape of the incident. After taking a caucus, Cloherty responded by telling the Union that the incident occurred on December 5, 1999 and the Respondent had captured it on tape. Brown asked to see the videotape before the upcoming third step grievance meeting regarding Taylor's termination. There is no dispute that no video or audio tape of Taylor's alleged misconduct has ever been produced.

Taylor also attended the third step grievance meeting in March. According to Taylor, her representatives, Thompson and Guida, pressed the

Respondent for details of the alleged misconduct. Suzanne DeCourcy and Brigandi, the Respondent's representatives, declined to provide any more details, even including the name of Taylor's accuser. DeCourcy told Taylor and her representatives that they were only there to get Taylor's side of the story. Taylor denied having done anything wrong. However, she acknowledged that she did not mention her motor vehicle accident or her absence from the picket line in December 1999.¹³ According to Taylor, she did not learn the specifics of her alleged misconduct until she went to a hearing on her unemployment claim in July. At that time she learned that Kathy Falcon, the daughter of a resident, had made a written complaint that Taylor was not fit to work with the elderly because Taylor had cursed her and her family on a certain date. Taylor testified that it was not until she went to a second unemployment hearing in October that she learned what the specific profanity was and the identity of the resident. At the hearing before me, Taylor denied under oath that she engaged in the specific conduct cited by the Respondent.

Dr. Parker testified that she made the decision to terminate Taylor based on a written statement she received from Falcon on December 15, 1999. According to Parker, Falcon called her to complain about the incident on Monday, December 6, 1999, and wrote the

¹³ Neither DeCourcy nor Brigandi testified to contradict Taylor about this meeting.

statement at Parker's request. The statement, which is handwritten, dated December 8, 1999 and signed by Falcon, reads as follows:

On Saturday evening, December 4th at approximately 9:15pm, I was leaving Avery Heights Nursing Home after visiting with my mother Louise Horan who is a resident of station 3. When I came to the line of picketers, I was stopped due to traffic build-up. While I was waiting for my turn to proceed, I was verbally badgered by one of your aids (sic) - Pauline Taylor. I could hear her very clearly due to the loudness of her voice and the fact that my window was opened half-way. The fact that Pauline was screaming names and obscenities at me was not nearly as upsetting as the fact that she also began to verbally attack the reputation of my 82 year old mother. Her behavior was unprofessional, immoral and just plain disgusting. Her *exact* words were - "there's that bitch Horan's daughter. That bitch - that piece of trash! She's a little piece of trash and so is her mother."

Being in the health care field myself I find it very difficult to defend or excuse this kind of behavior for any reason. My mother resides at Avery and has nothing to do with the strike or Pauline Taylor. I hope that this angry woman will never care for anyone I know.

(emphasis in original.) Dr. Parker testified that she did not ask Falcon any questions about the incident

and did not otherwise investigate this complaint. According to Dr. Parker, she had no reason to doubt that Falcon was telling the truth. In making her decision to terminate Taylor, Dr. Parker also considered the fact that Taylor had only recently returned to work following an 8-month suspension for another alleged violation of a resident's rights. Although Dr. Parker was in possession of Falcon's written statement since December 15, and aware of the incident even earlier, she did not make her decision to terminate Taylor until February 22, which was about the time that Taylor was due to be offered reinstatement.

Falcon testified at the hearing in this case. Her description of the incident was consistent with her previous statement. Although counsel for the General Counsel and the Charging Party extensively cross-examined her, I found nothing in her testimony or demeanor to suggest she was fabricating her testimony. Falcon did acknowledge that she made the complaint of patient abuse that precipitated Cortavarria's termination in October 1998 and that she testified for the Respondent at Cortavarria's arbitration hearing. The alleged abuse involved her mother. Falcon also acknowledged seeing Taylor at Cortavarria's arbitration and that she knew that Taylor was a strong union supporter. The General Counsel and the Charging Party suggest this as a motive for fabricating her complaint against Taylor, arguing that Falcon is not credible because she held a grudge against Taylor stemming from Taylor's support of Cortavarria. I find it more likely that Taylor would hold a

grudge against Falcon and her mother for causing the discharge of her friend and fellow union activist and for testifying against Cortavarria at the arbitration. Because of this animosity, I find it more likely than not that Taylor would direct such profanity at Falcon on the picket line.

The General Counsel and the Charging Party argue that Taylor could not have engaged in the alleged misconduct because she was not even on the picket line on December 5. The General Counsel put Taylor's medical records into evidence and called her best friend as a witness to testify that she was caring for Taylor in Taylor's home around the time of this incident and did not see Taylor go to the picket line. According to Taylor's friend, Geraldine Llewellyn, Taylor was in too much pain to leave the house at that time. Although I am not a doctor, it is apparent that the medical records in evidence do not appear to support Taylor's claims of disability for such a prolonged period after her accident. The doctor who treated her in the emergency room 2 days after the accident reported in his notes that Taylor did not appear uncomfortable or in acute distress, denied numbness or tingling in her legs and told the doctor that she had been ambulatory with no apparent discomfort or impairment since the accident. Although the doctor noted some tenderness in her neck and lower back on physical examination, there were no other physical signs of any impairment. The doctor prescribed "rest, ice to the affected areas 15-20 minutes every two hours for the next two to three days".

The doctor also instructed Taylor to continue taking over-the-counter Motrin and gave her a prescription for 12 Flexeril to be taken three times a day "as needed" for spasm. There is no evidence in the record that Taylor sought any further medical treatment until February 17. Taylor acknowledged on cross-examination that she had a lawsuit pending regarding the motor vehicle accident.

The only objective evidence that would have confirmed whether Taylor was on the picket line, the log book or sign-in book maintained by the Union to keep track of employees attendance at the picket line, is mysteriously missing. Curiously, it is only the portion of the log book for the month of December that the Union has been unable to locate. The General Counsel offered the testimony of William Welz, the Union's vice president who had been in charge of arranging the facilities for a strike headquarters from the beginning of the strike until March. Welz testified that he rented a camper van from a place in Rhode Island for use as a strike headquarters beginning in January. According to Welz, he returned this van to the rental facility in March, at the request of Almena Thompson. Welz testified that Thompson called him later in March and told him that some photographs and log books that had been in the van were missing. At Thompson's request, Welz contacted the rental company and inquired whether any material had been found in the van. Welz was told that the rental company had no such material and that it was customary to throw out any material found in a van

when it is cleaned. Welz testimony was almost entirely hearsay. Moreover, Thompson, who was present through most of the hearing and presumably would have direct knowledge of the missing log book, did not testify. I must draw an adverse inference from her failure to testify on this point, i.e., that the log book was not lost and that if produced it would show that Taylor was present on December 4 when the misconduct allegedly occurred.

It is undisputed that the Respondent terminated Taylor for conduct related to the strike. Therefore, the Respondent has the burden of establishing that it had an honest belief that Taylor had engaged in misconduct serious enough to warranted denial of reinstatement when it terminated her on February 22. *Siemens Energy & Automation, supra*; *Rubin Bros., supra*. As noted above, Dr. Parker based her decision solely on Falcon's statement without conducting any investigation and without providing Taylor with an opportunity to respond to the accusations against her. As with the other terminations, it appears that the Respondent seized upon Falcon's complaint to rid itself of an active union delegate whom it had been unsuccessful in terminating previously. In this regard, I note the testimony of Brown that Harper told him, in July 1999, that he never wanted to take Taylor back, that he didn't like her as a human being.¹⁴ Although I have found Falcon to be

¹⁴ Although Harper denied making such a statement, I found his denial less credible than Brown's testimony. I note
(Continued on following page)

a credible witness, and believe that the incident probably occurred as described in her December 8, 1999 statement, I can not find that the Respondent was acting honestly and in good faith when Parker terminated Taylor more than two months later without even questioning Taylor about the incident.

Even assuming the Respondent had an honest, good-faith belief that Taylor had called Falcon and her mother a coarse and profane name, such conduct would not be sufficiently egregious to warrant denial of reinstatement under current Board law. As noted above, the Board's *Clear Pine Mouldings* standard for evaluating verbal conduct during a strike requires that Taylor's conduct be "such that, under the circumstances existing, it may reasonably tend to coerce or intimidate" persons such as Ms. Falcon. 268 NLRB *supra* at 1046. See also *Shalom Nursing Home, supra*. The Board has historically found the use of epithets and language such as that used by Taylor here does not meet this objective test unless it is accompanied by overt or indirect physical threats or raises the reasonable likelihood of a physical confrontation. *Nickell Moulding*, 317 NLRB 826, 827-830 (1995);

that the Respondent's counsel did not attempt to elicit this denial during Harper's direct examination, suggesting that counsel did not anticipate such a contradiction. It was only in response to leading questions on cross-examination that Harper denied making such a statement. At the same time, however, he corroborated Brown's testimony regarding the fact that such a meeting had occurred and that the topic of Taylor's reinstatement had been discussed.

Calliope Designs, Inc., 297 NLRB 510, 521 (1989); *Catalytic, Inc.*, *supra*. See also *National Assn. of Government Employees*, 327 NLRB 676, 681 (1999) and cases cited therein. There is no evidence here that Taylor's profane, abusive and unprofessional verbal attack on Ms. Falcon was accompanied by any words or actions that could reasonably be deemed threatening or likely to result in a physical confrontation.

Accordingly, based on the above, I find that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint, by terminating Pauline Taylor on February 22, 2000.

C. The Respondent's Hiring of Permanent Replacements

The undisputed evidence in the record establishes that the Union, unable to reach agreement on a new collective-bargaining agreement with the Respondent, commenced a strike on November 17, 1999. There is no allegation or evidence in the record that the Respondent had committed any unfair labor practices that caused the employees to go out on strike. Nor is there any allegation that the strike was prolonged by any subsequent unfair labor practice. Thus the issue squarely presented by the pleadings is whether, notwithstanding the long-recognized right of an employer to hire permanent replacements for

employees engaged in an economic strike,¹⁵ the Respondent's action in doing so here was discriminatorily motivated in violation of Section 8(a)(1) and (3) of the Act. The General Counsel, while acknowledging that the Board has never found such a violation, argues that language in a 1964 decision by the Board permits finding a violation where there is "evidence of an independent unlawful purpose". *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964). The Charging Party would go further, arguing that the Respondent's hiring of permanent replacements was unlawful even absent independent evidence of a discriminatory motive because such conduct is "inherently destructive of important employee rights", relying on the Supreme Court's decisions in *Great Dane Trailers* and *Fleetwood Trailer Co.*¹⁶ The Respondent defends by relying on a wealth of precedent holding, essentially, that an employer faced with an economic strike by its employees can hire permanent replacements "at will". See *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 at n. 8 (1983) citing *Hot Shoppes, Inc.*, *supra*.

1. The Scope of the Complaint

At the outset of the hearing, counsel for the General Counsel stated that he was not seeking to

¹⁵ See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

¹⁶ *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

establish a violation of the Act under the Charging Party's "inherently destructive" theory. Because the Act confers on the General Counsel exclusive jurisdiction over the prosecution of unfair labor practice complaints, I must first determine whether the Charging Party's theory of the case is cognizable. *Zurn/N.E.P.C.O.*, 329 NLRB 1 (1999); *New Breed Leasing Corp.*, 317 NLRB 1011 (1995); *Kimtruss Corp.*, 305 NLRB 710 (1991); *Penntech Papers*, 262 NLRB 264 (1982). The Charging Party argues that his legal arguments do not impinge upon the General Counsel's jurisdiction because his theory of the case does not "enlarge upon, or alter, the allegations" of the complaint. Under the Charging Party's view of the case, the difference between his and the General Counsel's theories is simply regarding the proper legal standard to apply in analyzing the Respondent's conduct.

The complaint, at paragraphs 13(a) and (b), alleges that, "commencing on or about December 15, 1999, the Respondent permanently replaced certain of its striking employees" and that it engaged in that conduct "because its employees joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities". Paragraph 19 alleges that the Respondent, by engaging in this conduct with such motivation, "has been discriminating in regard to the hire or tenure or terms and conditions of employment of the employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) of the Act."

While it is true that both the General Counsel's and the Charging Party's theories require an evaluation of the Respondent's motives in hiring permanent replacements for its economic strikers, they differ in significant respects. Under the General Counsel's *Hot Shoppes* theory, the burden is on him to prove that the Respondent had an "independent unlawful purpose." 146 NLRB at 805. In contrast, the *Great Dane* theory advanced by the Charging Party presumes that the Respondent had an unlawful object and requires a determination of the degree to which its conduct affected employee rights. If, as the Charging Party argues, the Respondent's conduct was "inherently destructive" of those rights, the Board can find a violation even if the Respondent establishes that it was motivated by legitimate business considerations. If the adverse effect on employee rights is "comparatively slight", the burden still rests on the Respondent to prove it had a "legitimate and substantial business justification" for hiring the replacements. 388 U.S. *supra* at 34. The theory advanced by the Charging Party would thus place a greater burden on the Respondent than that proposed by the General Counsel.

I find that the Charging Party's argument here does "enlarge upon or change" the General Counsel's theory of the case. To agree with the Charging Party's theory would essentially overrule long-standing precedent, including *Hot Shoppes*, that has imposed only a minimal burden on an employer where the hiring of permanent replacements during

an economic strike is at issue.¹⁷ A decision whether to argue for overruling such precedent lies exclusively with the General Counsel. Because the General Counsel is not arguing that the Respondent's hiring of permanent replacements was "inherently destructive" of employees' Section 7 rights, I shall not address the Charging Party's theory of the case. See *Zurn/N.E.P.C.O.*, *supra*.

2. Facts

The Respondent did not hire permanent replacements at the outset of the strike. Instead, the Respondent relied upon nonstriking employees, managers, temporary employees and volunteers to perform the work of its striking employees. In its answer to the complaint, the Respondent admitted the allegation that it commenced hiring permanent replacements on December 15, 1999. The evidence adduced at the hearing, including evidence proffered by the General Counsel, indicates that no permanent replacements were hired before December 22, 1999. Because the Respondent's answer is a confessional admission, I must find as alleged in the complaint that the Respondent began hiring permanent replacements on December 15, 1999. *C.P. Associates*,

¹⁷ The Board recently reaffirmed the principal that the hiring of permanent replacements during an economic strike does not cause the long-term consequences that would be indicative of inherently destructive conduct. *Capchorn Industry, Inc.*, 336 NLRB 364, 366-367 (2001).

336 NLRB 167 (2001). This date coincides with a meeting between Union president Brown and the Respondent's CEO Harper at which the General Counsel alleges that the Respondent unlawfully misrepresented its intentions regarding the hiring of permanent replacements. Brown testified that Harper told him at this meeting that the Respondent had not hired permanent replacements and had no intentions of doing so. Harper denied making any such commitment. Before reaching this credibility resolution, it must be determined whether the Respondent already had made the decision to hire permanent replacements before Harper met with Brown. If not, then Harper's statement would not be a misrepresentation.

The precise date on which the Respondent made the fateful decision to begin permanently replacing the strikers is in dispute. The Respondent's CEO, Harper, and its Administrator, Dr. Parker, testified regarding the decision.¹⁸ Harper testified that this decision was made in mid-December when it became apparent that the strike would not soon be over. Harper was "quite sure" the decision had not been made by the time he met with Brown on December

¹⁸ Harper testified that the decision was made at a meeting with Parker, the Respondent's attorney, Cloherty, and its chief financial officer, Ray Gasparini. Dr. Parker did not identify Cloherty as a participant in the decision. Gasparini did not testify. Although Cloherty testified as to other matters, he was not asked about the Respondent's decision to hire permanent replacements.

15, 1999. According to Harper, the decision was made a week later, about December 22, 1999. On cross-examination, Harper conceded that he was not clear on the date and that it was possible that the decision was made earlier. Dr. Parker testified that the decision was made "around December 14, [1999] or so." She acknowledged, however, that the Respondent began exploring the possibility of hiring permanent replacements earlier, within the first week to 10 days of December. Robert DeLisa, a consultant hired by the Respondent to assist it in recruiting permanent replacements, testified that he was first contacted by Suzanne DeCourcy, the Respondent's director of employee development, in late November or early December, 1999. After meeting with DeCourcy, DeLisa and his staff developed a plan which included using a job fair to generate a pool of applicants from which permanent replacements could be hired. Invoices from DeLisa, which were paid by the Respondent, show that he started working on this project on December 1, 1999. By December 10, 1999, DeLisa's company had placed ads with radio stations and newspapers. On December 15, 1999, two of his employees staffed a job fair run by another organization and on December 13-17 and 20-22, 1999, staffed its own job fair to recruit potential applicants for the Respondent.

In addition to utilizing the services of DeLisa's consulting company, the Respondent turned to temporary employees that had started working after the strike began as a source of permanent replacements.

The testimony of Dr. Parker and Gayle McAllister, the Respondent's director of operations, indicates that the Respondent started offering permanent employment to these temporary employees in mid-December. Scott Cohen, the owner of Class Act Cleaning, one of the agencies supplying temporary employees to the Respondent in the beginning of the strike, testified that he first learned that one of his employees had been offered a permanent position with the Respondent sometime during the second week of December and that he spoke to McAllister about this during the second or third week of December, 1999. Cohen reached an agreement with McAllister under which the Respondent would pay class act "\$1100/head" for each employee who converted from Class Act to the Respondent's payroll. Invoices in the record establish that the Respondent started receiving invoices for this fee on December 22, 1999. Ingrid Tifa, who started working in housekeeping for the Respondent through another temporary agency on November 29, 1999, testified that she was offered permanent employment on December 22, 1999. Summaries prepared by the Respondent from its payroll and personnel records show that most employees who converted from temporary to permanent did so December 22-24, 1999.

Based on the testimony of Dr. Parker and the other evidence regarding the Respondent's efforts to hire permanent replacements, I find that the Respondent had made its decision to permanently replace the strikers no later than December 14, 1999. There

is not a shred of evidence in the record to corroborate Harper's testimony that no decision had been made before he met with Brown.

As noted above, the parties' last negotiation session before the strike was on November 16, 1999. Brown testified that, after the strike began, he telephoned Cloherty, the Respondent's attorney, about once a week to ask if there were any developments, or anything that the parties needed to talk about. Each time, Cloherty replied in the negative. Cloherty acknowledged receiving several telephone calls from Brown in the first few weeks of the strike. Both Brown and Cloherty recalled having a specific discussion on December 2 or 3, 1999, regarding the possible duration of the strike. Brown testified that he told Cloherty that the Union would not do what it did in 1995, i.e., offer to return to work without a contract. He told Cloherty that the Union wanted to resolve the contract before returning to work this time. Brown acknowledged saying to Cloherty that, if the parties' positions did not change, he expected it to be a long strike. Cloherty's testimony regarding this conversation was consistent with Brown's testimony. There is no dispute that, at the conclusion of each conversation, Brown would generally tell Cloherty to call him if anything changed on the Respondent's side. Neither Brown nor Cloherty recalled having any specific discussion regarding permanent replacements. Brown testified that he stopped calling Cloherty about four weeks into the strike, which would be in mid-December.

Brown testified that he contacted Harper directly sometime in December to congratulate him on the way he handled an incident that occurred on the picket line at the Respondent's Miller Memorial facility in Meriden. The incident apparently involved a racist attack on one of the strikers which Harper had acted swiftly to condemn. After expressing his appreciation for Harper's response, Brown suggested that the two meet to see if there was an opportunity to resolve the strike. Harper agreed to meet Brown on December 15, 1999, at Corvo's Restaurant in Hartford. Brown and Harper met as planned on December 15. No one else was present. Brown testified that he told Harper at this meeting that incidents like the one in Meriden were the type of things that could happen during a strike which were not planned or anticipated but would make settlement more difficult. He went on to cite other examples of unanticipated events that could protract a strike, such as picket line misconduct or the hiring of permanent replacements. Brown suggested the parties try to resolve the contract issues before these things happened. According to Brown, Harper responded by saying "we have no intention of hiring permanent replacements. We are not hiring permanent replacements. We're doing great with temporaries." Harper then commented that "U.S. Nursing is a great outfit". U.S. Nursing is known to the Union as a supplier of temporary replacements in strike situations. According to Brown, he and Harper then discussed some of the contract issues separating the parties. Brown testified that he and Harper discussed the duration of the contract,

with Harper taking the position that he wanted a long-term contract for stability and that he did not want an expiration date that coincided with the Union's other contracts. Harper told Brown that he didn't want to be competing with other facilities for replacement workers. Brown recalled that Harper also expressed his belief that the Union would ultimately agree to a 4-year contract in 9 weeks. Brown replied that the Union would not agree to 4 years in nine weeks. Brown and Harper also discussed the economic package and the Union's desire to bring the Respondent back into the pattern agreement. At one point during the meeting, Brown proposed a 3-year contract with an agreement that the next contract would also be for 6 years with binding arbitration if the parties could not agree on the terms. According to Brown, Harper scoffed at this proposal, saying that an arbitrator would have to consider the Respondent's ability to pay and the Respondent had the ability to pay. Brown testified that 60-70 percent of the conversation at this meeting involved the contract duration and benefit fund contributions. At the end of the meeting, he and Harper shook hands and Harper said the meeting had been useful, that the lines of communication were still open. He told Brown that he would not be doing the negotiations, that Cloherty would be contacting Brown for negotiations. Brown heard nothing further from Harper or Cloherty until the parties met at the FMCS on January 3.

Harper's testimony regarding the December 15, 1999 meeting was elicited primarily through leading

questions from the Respondent's counsel. Although Harper corroborated much of Brown's testimony as to the subjects that were discussed, he denied that there was any mention of permanent replacements. He specifically and vigorously denied making the statements attributed to him by Brown regarding the Respondent's intentions. Harper testified that it became apparent to him at this meeting that the Respondent was in for a long strike, that there would be no settlement unless the Respondent capitulated to the Union's demands. Harper's testimony regarding this meeting was far less detailed than Brown's testimony, which at times appeared to be a verbatim record of what was said. The credibility issue and my findings regarding this meeting will be discussed in my analysis of the Section 8(a)(5) allegation.

Although there is a dispute whether Harper gave Brown any assurances at the December 15 meeting that the Respondent was not going to hire permanent replacements, there is no dispute that Harper did not tell Brown that the Respondent was even considering the matter. In fact, the Respondent's witnesses admitted that a decision was made not to inform the Union of the Respondent's plans to permanently replace the striking employees. Moreover, Cohen, the owner of class act cleaning, testified that McAllister told him, during their discussion of Respondent's interest in hiring Cohen's temporary employees, that the Respondent's plans were to be kept "hush-hush". McAllister told Cohen not to say anything to anyone associated with the Union. McAllister also told Cohen

that the Respondent needed to get as many bodies in as it could before the Union found out. Although McAllister denied making such statements to Cohen, I found her not to be a very credible witness. Her answers were often evasive and nonresponsive and she professed a lack of recall about virtually any matter of importance during the early days of the strike. Under those circumstances, her supposed recollection that she did not make these statements to Cohen is hard to believe. In addition, Cohen appeared to be testifying credibly. Cohen acknowledged that his business relationship with the Respondent ended on a sour note, with accusations in both directions of improper conduct. However, he has no stake in the outcome of these proceedings and no reason to commit perjury by fabricating testimony in these proceedings.

Despite the Respondent's efforts to keep the Union from learning about its plans, information came to the attention of the Union which caused it to become suspicious. Brown testified that he was shown a flyer that had been posted about a job fair for people interested in positions similar to those occupied by the strikers. The flyer did not identify any particular employer. Around the same time, Brown learned from a member that a similar advertisement was being broadcast on a polish-language radio station in New Britain, Connecticut. In order to determine whether the Respondent was soliciting applicants, Brown sent several members who did not work at the Respondent's facility to the job fair. One

of these members reported back to him that, after attending the job fair, she was called and offered a permanent position with the Respondent.¹⁹ Brown could not recall the exact date he received this information, but expressed his belief that it was right around Christmas, most probably during the week between Christmas and New Years. The invoices from DeLisa's company, which held the job fair for the Respondent, show that the last day of the fair was December 22, 1999. Upon receiving this information, Brown called the federal mediator and requested him to set up a meeting with the Respondent for January 3.

Before meeting with the Respondent, Brown had a meeting with attorney Emanuel Psarakis on December 22. Brown has known Psarakis for many years as a management attorney representing other facilities. Psarakis was not representing the Respondent at that time and worked for a different law firm than Cloherty and the Respondent's counsel. Brown's meeting with Psarakis came about after Brown had left a voice mail message for one of the trustees of Miller Memorial. Miller is the nursing home in Meriden, Connecticut, that was managed by the

¹⁹ I received this testimony, not for the truth of the statements in the flyers and the reports Brown received, but to show Brown's state of mind and explain his subsequent actions. Whether the member was in fact offered a job with the Respondent is not as significant as the fact that the Union was presented with information that caused it to believe that the Respondent was hiring permanent replacements.

Respondent for a non-profit, charitable foundation. As noted previously, the Union had been simultaneously in negotiations with the Respondent for the Avery Heights and Miller facilities. Brown reached out to the trustees in the hope of putting pressure on the Respondent to come to terms on a contract at Miller. It was Psarakis who responded to Brown's message to the trustees.

Psarakis and Brown met at a diner in Rocky Hill, Connecticut. No one else was present. Psarakis opened the meeting by stating that he did not represent the Respondent, that the trustees were his clients, and that he was not handling labor relations for them. Brown and Psarakis then discussed the issues separating the Union and the Respondent at Miller. At one point in the conversation, the subject of permanent replacements came up. According to Psarakis, Brown said he heard that the Respondent was hiring permanent replacements at Avery Heights, and "there's going to be a war. I will bring in the AFL-CIO." Brown denied making such a statement to Psarakis. According to Brown, he told Psarakis that if the Respondent hired permanent replacements at Miller, it would be a "serious thing." Brown testified that he raised this subject with Psarakis because of his suspicions that the Respondent was already hiring permanent replacements. On cross-examination, Brown acknowledged that he probably told Psarakis that he suspected that the Respondent was hiring permanent replacements. There is no dispute that Psarakis did not tell Brown

at this meeting that the Respondent was in fact hiring permanent replacements at the Avery Heights facility.²⁰

The parties met, as planned, on January 3 at the offices of the FMCS. Brown attended this meeting with Union staff members Guida and Thompson and an employee committee. The Respondent was represented by Attorney Cloherty and Dr. Parker. At this meeting, Brown asked Cloherty directly if the Respondent had hired permanent replacements. Cloherty said yes. When Brown asked how many, Cloherty said "over 100". This represented more than half the positions in the bargaining unit. Brown then asked if the Respondent had any written agreements or anything in writing about the status of the replacements. Cloherty replied that it did not. Brown admitted that he did not bring up at this meeting the assurance Harper gave him less than three weeks earlier that the Respondent was not going to hire permanent replacements. Brown also asked Cloherty what the Respondent was paying the replacements and Cloherty said \$12.19/hour. This was more than the Respondent was offering the Union as a starting wage in negotiations at that time. When Brown asked Cloherty about benefits, Cloherty said the Respondent had not decided yet what to do about benefits, but the replacements would be covered by whatever

²⁰ There is also no dispute that the Respondent did not hire any permanent replacements for striking employees at Miller.

benefits were agreed upon in a new contract. Although there are some slight differences in Cloherty's recollection of the conversation, he essentially corroborated Brown as to material parts of the meeting, i.e., that Brown asked about replacements and he told Brown that the Respondent had already hired "around 100" replacements. He also agreed with Brown's version of the conversation regarding the wages and benefits paid to the replacements.²¹

After this meeting, Brown called a meeting of the strikers from Avery Heights and Miller. Brown told the striking employees what had happened at the January 3 meeting and recommended they make an immediate offer to return to work. The members agreed and, by letter dated January 5 and faxed to the Respondent's counsel the same day, the Union made the first offer to return to work. In this letter, Brown offered on behalf of the strikers to "return to work immediately, as a group, and to continue working under the terms and conditions of the collective bargaining agreement in effect as of October 30, 1999, pending the negotiation of a successor collective bargaining agreement."

Dr. Parker responded to the Union's offer in a letter the same date. In this letter, Dr. Parker

²¹ At another meeting the same day, in the presence of the mediator, Brown asked the attorney representing the Respondent in the Miller negotiations, Louis Todisco the same question. Todisco told the Union that no permanent replacements had been hired at Miller.

expressed the Respondent's willingness to offer the striking employees reinstatement under the Board's *Laidlaw* doctrine.²² Specifically, Parker told the Union that "employees who are presently working would retain their positions. Other bargaining unit positions would be available for striking employees. If insufficient positions existed, striking employees would be placed on a preferential hiring list." Dr. Parker also questioned whether the Union's offer was unconditional. In her letter she specifically asked whether the Union was seeking retention of the union security clause as a condition to reinstatement and whether the phrase "return as a group" meant either all employees or no employees. Dr. Parker also responded, by letter on January 5, to the Union's inquiry at the January 3 meeting regarding the status of hiring of permanent replacements. She advised the Union that all positions in the job categories of housekeeping, drivers, maintenance, laundry, cooks, dietary personnel, Heights housekeeping, Heights maintenance, Heights dishwashers, Heights wait staff, and all but a 36-hour position for a Heights cook, had been filled by permanent replacements. Dr. Parker advised the Union further that there were 25 CNA positions and 15 part-time positions in the nursing department that were still available for the returning strikers.

²² *Laidlaw Corporation*, 171 NLRB 1366, 1369 (1968).

Brown responded to Parker's letters on January 6. He stated that the Union was not insisting that the union security clause be honored in the absence of a contract and he reiterated the offer to return "as a group", explaining that this meant the striking employees would not be displaced by permanent or temporary replacements, but would not have to be recalled or could face layoff if work no longer existed for them because, for example, a wing had closed or the census was greatly reduced. It is undisputed that the Respondent did not take any of the striking employees back in response to this offer.

On January 12, the parties met with the Mayor of Hartford at city hall. The mayor was attempting to bring about a settlement of the strike. Brown and Thompson were present for the Union and Cloherty and Harper for the Respondent. Brown testified that Cloherty gave a long explanation for the Respondent's decision to hire permanent replacements, citing the need for stability in light of Brown's statements indicating it would be a long strike. Cloherty also told the Mayor and the Union that the Respondent had to make a commitment of permanent employment to get replacements. When asked if there was any way that the Respondent could take the strikers back, Cloherty replied that the Respondent was "on the hook" to the replacements, that it had made binding commitments to them, citing the Supreme Court's *Belknap* decision. Cloherty told the Mayor and the Union that the Respondent was prepared to negotiate a contract with the Union, but could not discuss terminating the

replacements to make room for the returning strikers. The Mayor asked the Respondent for a moratorium on hiring permanent replacements for 10 days during which the parties would engage in intense negotiations for a contract. The Respondent agreed. Cloherty did not dispute Brown's testimony regarding this meeting.

The parties did hold several meetings in the 10-day period after this meeting, but they were unable to reach agreement on a contract. At a meeting in Cloherty's office on January 19, at which Harper was present, Brown proposed a 4-year contract. When the Respondent rejected this proposal, Brown reminded Harper of the prediction he made at their December 15 meeting, i.e., that the Union would agree to 4 years in 9 weeks. Brown said, "it's been nine weeks, does that change your position?" Harper replied, "no". On January 20, the Union presented the Respondent with another offer to return to work. This offer was explicitly unconditional with no mention of terms and conditions or reinstatement as a group. It is undisputed that, in response to this offer, the Respondent began reinstating strikers to vacant positions. By the time of the hearing, the Respondent had reinstated 78 or 79 strikers. The last formal negotiation session occurred on March 3 without any agreement being reached. The Union has maintained a picket line at the Respondent's facility since January 20 to protest the Respondent's refusal to reinstate all the strikers.

Harper and Parker testified regarding the reasons for the Respondent's decision to hire permanent

replacements. They testified that the Respondent chose to change its strategy and hire permanent replacements because of concerns about continuity of care for the residents, morale of the staff and reliability and consistency of using temporary employees and volunteers over a long term. The decision to begin hiring permanent replacements coincided with statements made by Brown, in his telephone conversation with Cloherty on December 2 or 3 and his meeting with Harper on December 15, indicating that the strike would not be over soon. Dr. Parker testified that she observed that the managers, supervisors and non-unit staff who were working mandatory 12-hour shifts to replace the strikers, were getting tired. Some expressed to her their concerns about working long hours during the upcoming holidays. Dr. Parker testified further that the volunteers, although well-meaning, couldn't be counted on to continue to devote time to performing work of strikers in the face of competing demands on their time, particularly with the holiday season approaching. According to Dr. Parker, the temporary employees that had been hired directly and through agencies, were not a good long-term solution. There was considerable turnover among the temporary employees. Each time a new temporary employee was sent to the facility, he or she would have to undergo an orientation to learn the Respondent's procedures and policies. Constantly changing caregivers would also be detrimental to the residents who would not be able to develop any kind of relationship with their caregivers. Dr. Parker also cited the cost of using overtime and agency employees

rather than regular employees to perform the work of the strikers.

On December 31, 1999, Harper sent a confidential memorandum to the Respondent's board of directors regarding the status of negotiations and the strike. In this memo, Harper informs the directors of the upcoming meeting on January 3 with the Union and the mediator. He predicts only limited movement from the Union at this meeting, because Brown

... remains in the mode of bringing a handful of strikers to each meeting. In their presence, he seizes the opportunity to grandstand with his no compromise social justice message and threat of a long-term strike ...

However, while he postures and schedules meetings a week apart, we are making progress ...

Harper then listed eight items of "progress" in such areas as quality and consistency of service to residents, employee morale, state oversight and admission of new residents. The last three address the issue of permanent replacements as follows:

6. As a well-executed event the day before Christmas, we began to permanently replace striking workers at Avery. These new employees have some distinct advantages: they are pleased to have the job for the money that we currently pay; they have fine work ethics; they want to learn; they are less expensive than temporary workers; and they bring predictable stability for the future,

when the strike is over, because they say they want to work here for a long time. So far, we have hired 104 permanent replacements at Avery, replacing 60% of those on strike. If Mr. Brown refuses to seriously negotiate in good faith, we plan to add one or more permanent replacements each day. We have him in a real bind at Avery.

7. We have not yet begun to add permanent replacements at Miller, but the threat is clearly before Mr. Brown. We also reminded Mr. Brown and the strikers that we are considering the option of no longer paying for their health insurance while they are on strike. The objective of the health insurance tactic was to cause the strikers to gang up on Mr. Brown and demand that he compromise to achieve a contract or they will come across the picket line. Yesterday's movement at Miller may be evidence that the health insurance threat, along with our permanent replacement success at Avery, is working. Remember, the Miller workers are new to the Union and their solidarity commitment is not nearly as solid as at Avery Heights. It could also be said that we have Mr. Brown in a real bind at Miller.

8. Remember, this Union has no strike fund except for the few members that put in 40 hours a week on the picket line. They receive \$100. Depending upon their shift differential status, these workers have become accustomed to earning between \$487 and \$580 per week. Because of this disparity, we know

that some former workers here abandoned the strike and have obtained employment elsewhere.

Harper acknowledged drafting this memo for the Respondent's directors. Cloherty testified that he was not aware of Harper's memo until sometime after it was sent to the Board of Directors.

3. Analysis and Conclusions

a. *The alleged December 15 misrepresentation as a violation of Section 8(a)(5)*

The complaint alleges that Harper's statement to Brown at their December 15, 1999 meeting, that the Respondent had no intentions of hiring permanent replacements for the strikers, constituted an unlawful misrepresentation in violation of Section 8(a)(5) of the Act. The Respondent has not only denied this allegation on the merits, but has asserted that the allegation is barred by Section 10(b) of the Act because it was not specifically included in the original charge that was filed within 6 months of the incident. The General Counsel acknowledges that this specific allegation first appears in the amended charge that was filed by the Union on July 31 and served on the Respondent on August 7, but argues that it is "closely related" to the allegations of the original charge under the Board's decision in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

The Board applies a three part test to determine whether the allegations of an amended charge are closely related to those in an original charge to survive Section 10(b) of the Act. The Board first determines whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely filed charge. Next, the Board looks at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as those in the timely charge. Finally, the Board may consider whether a respondent would raise similar defenses to the allegations. *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989), citing *Redd-I, supra*. Although *Nickles* and *Redd-I* involved the relatedness of a complaint allegation to a charge, the Board has held that the same test applies for determining whether otherwise time-barred allegations in an amended charge relate back to allegations in an earlier timely filed charge. *Ross Stores, Inc.*, 329 NLRB 573 fn. 6 (1999). See also *Office Depot*, 330 NLRB 640, fn. 4 (2000).

Applying the above test to the facts here, I find that the allegation of the complaint and amended charge that the Respondent bargained in bad faith in violation of Section 8(a)(5) by misrepresenting its intentions regarding the hiring of permanent replacements is closely related to the Section 8(a)(1), (3), and (5) allegations in the original timely filed charge. The charge, as originally filed, alleged, inter alia, that the Respondent violated Section 8(a)(5) as well as Sections 8(a)(1) and (3) by hiring permanent

replacements and refusing to reinstate all striking employees upon the Union's unconditional offer to return to work. The original charge also contained a general Section 8(a)(5) failure to bargain in good faith allegation. The allegations in the complaint and amended charge involve the same legal theory as those in the original charge because they place in issue whether the Respondent fulfilled its duty to bargain in good faith by hiring permanent replacements and misleading the Union about this, leading to the employer's refusal to reinstate all the strikers in January. Moreover, the timely and allegedly untimely allegations involve "acts that are part of the same course of conduct, such as a single campaign against a union . . . or part of an overall plan to resist organization." *Ross Stores, Inc, supra* and cases cited therein. Under the General Counsel and the Charging Party's theory of the case, Harper's December 15 misrepresentation was part of the Respondent's scheme to unlawfully deny reinstatement rights to a majority of the strikers. Thus, the allegations of the amended charge, as well as those in the original charge, arose out of the same sequence of events, i.e., the Respondent's response to its employees exercise of their right to strike in support of the Union's contract demands. The investigation of the Union's original charge would logically entail a review of the parties collective-bargaining negotiations which preceded the strike and any meetings or communications during the strike, such as Brown's December 15 meeting with Harper. In fact, Harper conceded that he was asked about this meeting in May, while Union's

original charge was being investigated. It is therefore undisputed that this specific allegation was presented to the Respondent during the investigation of the original charge, even before the amended charge specifically mentioned it. Accordingly, I find that this allegation is not barred by Section 10(b) of the Act and shall reject the Respondent's affirmative defense.

A determination of the merits of the charge requires resolution of a conflict in the testimony of Brown and Harper. Harper was as certain that he gave no assurances to Brown as Brown was certain that he did. There was nothing apparent in the demeanor of Brown or Harper that would suggest that either was testifying falsely. The mere fact that Brown gave a more detailed account of the meeting does not mean he was more truthful. This meeting occurred 15 months before the witnesses appeared at the hearing and neither had made or retained any notes of their conversation. Under these circumstances, it is not surprising that Harper's recollection of the details of the meeting would not be very precise. It is also not unfathomable that someone would have a specific recollection as to one subject while not recalling other matters. At the same time, Brown's almost verbatim recitation of the conversation, so long after it occurred, was surprising in view of his acknowledgement that he retained no contemporaneous notes to review before testifying. What I find even more surprising is the fact that Brown made no mention of Harper's commitment not to hire permanent replacements when he learned that the

Respondent was in fact doing so. Brown explained his failure to confront Harper about this misrepresentation by testifying that it was only his word against Harper and he did not want to get into a "he said, she said" dispute. Although this explanation is plausible, it is not consistent with Brown's behavior during meetings with Harper in January. While reluctant to confront Harper about this serious misrepresentation, he did confront Harper regarding two other statements Harper made during their December 15 meeting. When the Respondent rejected Brown's proposal for a 4-year contract, Brown didn't hesitate to remind Harper that he had said, on December 15, that the Union would agree to a 4-year contract in nine weeks. Similarly, when Cloherty expressed surprise at Brown's proposal for an extended duration with a reopener and binding arbitration, Brown questioned Harper whether he had communicated this offer to Cloherty when Brown first made it at the December 15 meeting. I have similar doubts about Harper's credibility. Harper's rather vague testimony about his conversations with Brown in general does not provide much confidence in the reliability of his convenient denial that he made this damaging statement. I also note that a deliberate misrepresentation as described by Brown would be consistent with the "pre-Christmas surprise" that Harper was so proud of in his memo to the Respondent's directors.

Having considered the above factors, and while not entirely free from doubt, I find that Harper's denial is more credible than Brown's testimony that

Harper told him the Respondent had no intention of hiring permanent replacements. Brown may sincerely believe now that he heard such a commitment from Harper on December 15, 1999. His actions in the period soon after the meeting, however, when such a commitment would have been a critical piece of evidence against the Respondent's hiring of permanent replacements, convince me that the statement was not made by Harper. Because I find that Harper did not tell Brown on December 15, 1999, that the Respondent had no intention or plans to hire permanent replacements, there was no "misrepresentation". Accordingly, I must recommend dismissal of this allegation of the complaint.

b. *The Respondent's hiring of permanent replacements for the economic strikers as a violation of Section 8(a)(1) and (3)*

The complaint alleges that the Respondent began hiring permanent replacements for its striking employees on December 15, 1999, because "the employees joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." The General Counsel argues that because the Respondent had an independent discriminatory motive for permanently replacing the strikers, its otherwise lawful conduct violated Section 8(a)(3) of the Act. The complaint further alleges that the Respondent violated Section 8(a)(3) by failing and refusing to reinstate any of the

striking employees in response to the Union's January 5 offer to return to work, and by failing and refusing to reinstate all of the striking employees in response to the Union's January 20 offer.

The Board recently reaffirmed the long-standing principals governing cases such as this one:

.... It is well established that an employer's discouragement of employee participation in a legitimate strike constitutes discouragement of membership in a labor organization within the meaning of Section 8(a)(3). See *NLRB v. Great Dane Trailers*, 388 U.S. 26, 32 (1967) (citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963)). It is also evident that an employer's refusal to reinstate striking employees would tend to discourage employee participation in a strike effort. Accordingly, well-settled precedent dictates that an employer will be held to violate Section 8(a)(3) and (1) of the Act if it fails to immediately reinstate striking workers on their unconditional offer to return to work, unless the employer can establish a "legitimate and substantial business justification" for its failure to do so. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). The employer bears the burden of proving the existence of such a legitimate and substantial business justification. *Id.*

But, even if an employer does present sufficient evidence to demonstrate the requisite business justification, that is not the end of the inquiry. Thus, if the Board finds that

an employer's conduct is "inherently destructive of employee rights," no proof of anti-union motive is needed, and the Board may find an unfair labor practice notwithstanding that the employer was motivated by business considerations. In contrast, if the adverse effect of the employer's conduct on employee rights is "comparatively slight," an antiunion motive must be proved to sustain an 8(a)(3) charge if the employer has presented evidence of a legitimate and substantial business justification. *Great Dane Trailers*, 388 U.S. at 33-34.

Capehorn Industry, Inc., 336 NLRB 364, 365 (2001).

In *Capehorn*, the Board found that the employer's refusal to reinstate economic strikers was unlawful because the employer did not satisfy its burden of proving a legitimate and substantial business justification. The employer had contended that permanent replacements had been hired for some of the strikers and that the work of other strikers had been permanently subcontracted. While reaffirming the principal that an employer's permanent replacement of economic strikers as a means of continuing its business operations would be a legitimate and substantial business justification for refusing to reinstate the strikers, the Board concluded that the employer had not met its burden of proving that the

replacements it hired were indeed permanent.²³ *Id.* The Board found further that the employer had not satisfied its burden of establishing that it had any business justification for permanently subcontracting unit work during the strike. Because the employer had not met its burden, the Board found it unnecessary to determine, under *Great Dane*, the extent to which the employer's conduct adversely affected employee rights. The Board instead analyzed the employer's conduct as if it had a "comparatively slight" impact on employee rights. *Id.* The Board's decision in *Capehorn* does not appear to disturb precedent, such as *Hot Shoppes*, *supra*, which hold that an employer's motive for hiring permanent replacements is essentially "irrelevant" in the absence of evidence of an independent unlawful motive. See also *Belknap v. Hale*, 463 U.S. *supra* at 504, fn. 8.

The following analytical framework can be gleaned from the decisions in *Fleetwood Trailer*, *supra*, *Hot Shoppes*, *supra*, and *Capehorn Industry*, *supra*. If the General Counsel establishes as a fact that the employer has failed or refused to reinstate economic strikers upon an unconditional offer to return, the Board will infer a discriminatory motive

²³ The General Counsel does not contend that the replacements hired by the Respondent on and after December 15, 1999 were not "permanent". The complaint and his theory of the case concedes that point. Moreover, the evidence in the record, including testimony from two replacement employees called as witnesses by the General Counsel, is sufficient to establish their status as permanent replacements.

because of the natural tendency of such conduct to discourage employees from supporting a union during a strike. However, the employer can avoid an unfair labor practice finding by presenting evidence of a "legitimate and substantial business justification" for its failure or refusal to reinstate the strikers. An employer who establishes that it has hired permanent replacements to fill positions left vacant by the strikers will be deemed to have presented a legitimate and substantial business justification without further scrutiny. See *Chotaw Maid Farms*, 308 NLRB 521, 528 (1992); *Waterbury Hospital*, 300 NLRB 992, 1006 (1990), enfd. 950 F.2d 849 (2d Cir. 1991).²⁴ In order to establish an unfair labor practice at that point, under *Hot Shoppes*, the General Counsel would have to present sufficient evidence to show that, in hiring permanent replacements, the employer had "an independent unlawful motive." To date, the Board has never found such a situation to exist. In those few cases where an administrative law judge has found evidence of an independent unlawful motive, the Board has expressly declined to adopt those findings and either reversed the judge, as it did in *Hot Shoppes*, or chosen an alternative basis for finding an unfair labor practice. *Nicholas County Health Care*

²⁴ To the extent the Court would impose a heavier burden on the employer to justify the use of permanent replacements, the Board has never accepted this view. I am constrained to follow the Board's interpretation of the Act until it is reversed by the Supreme Court. *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

Center, 331 NLRB 970 (2000); *Pennsylvania Glass Sand Corp.*, 172 NLRB 514, fn. 3 (1968). Under the *Hot Shoppes* analysis, if the General Counsel succeeded in proving the existence of an independent unlawful motive, presumably the burden would shift back to the Respondent to prove affirmatively that it had a legitimate and substantial business justification for choosing to continue operations with permanent replacements rather than by some other means. The Board has never gone this far in any case involving economic strikers.

Assuming the General Counsel presents evidence of an independent unlawful motive and the employer presents evidence to show it had a legitimate and substantial business justification, the question arises as to which party should have the burden of proving which motive prevailed. The General Counsel suggests that this case and the *Hot Shoppes* exception can be analyzed under the Board's *Wright Line* test for determining motivation.²⁵ Under this analysis, if the General Counsel establishes by a preponderance of the evidence that protected activity was a motivating factor in the employer's decision, then the burden would shift to the employer to prove that it would have taken the same action in the absence of such activity. That would be an unattainable burden in a strike situation because the employer would not have

²⁵ *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

had to make a decision whether to hire permanent replacements in the absence of the employees having exercised their Section 7 right to strike. I believe it is more appropriate to leave the ultimate burden on the General Counsel to show that the independent unlawful motive outweighed any legitimate and substantial business that the employer may have had.

There appears to be no dispute here that the Union's January 20 offer was, as it appears on its face, an unconditional offer sufficient to trigger the Respondent's obligation to reinstate the strikers absent a legitimate and substantial business justification. Because the record shows that the Respondent hired 23 permanent replacements between January 5 and January 20, it must be determined whether the Union's earlier offer was unconditional. The Board has held that any request for reinstatement during an economic strike that is conditioned upon removal of the cause of the strike is not an unconditional offer. *Atlanta Daily World*, 192 NLRB 159 (1971). Where the parties are bargaining for a new contract and the Union offers to return to work under the terms and conditions of the expired contract, the offer is not unconditional. *McAllister Bros.*, 312 NLRB 1121, 1123 (1998). In addition, by demanding that all employees be reinstated, where some strikers had been permanently replaced, the Union was also imposing a condition which would limit the effectiveness of its offer. Unless it is found that the hiring of these permanent replacements was unlawful, the

Union's January 5 offer would not be an unconditional offer. Cf. *NFL Management Council, et al.*, 309 NLRB 78, 80 fn. 11 (1992).

The Respondent here satisfied its initial burden of establishing a legitimate and substantial business justification for failing to reinstate all the strikers in response to either Union offer by showing that it had hired permanent replacements beginning on December 15, 1999. The General Counsel argues that, notwithstanding this legitimate and substantial business justification, there is other evidence that the Respondent had an "independent unlawful motive" for exercising its right to permanently replace striking employees. The General Counsel relies to a great extent on the alleged misrepresentation at the December 15, 1999 meeting where it is claimed that Harper deliberately lied about the Respondent's plans. I have already found, based on credibility, that Harper did not make the representation attributed to him by Brown and therefore, did not lie to the Union about its decision. However, the Respondent admits that it consciously concealed its decision to hire permanent replacements from the Union. The secretive nature of the Respondent's conduct is another piece of evidence relied on by the General Counsel. The General Counsel also relies upon Harper's December 31, 1999 memo to the Respondent's Board of Directors as proof of the true purpose behind the Respondent's secret plan. Finally, the General Counsel attempted to show that the asserted business

justification for the Respondent's decision was a pretext.

I find that the General Counsel has presented sufficient evidence that the Respondent had an independent unlawful motive when it decided, on or about December 15, 1999, to permanently replace its striking employees. It is undisputed that the Respondent made a conscious decision to keep its decision a secret. Thus, even if Harper did not lie about the Respondent's plans, he and the other management officials went out of their way to conceal the Respondent's hiring plans from the Union. The Respondent argues that the Board has never required an employer to notify a Union or the striking employees when it is considering hiring permanent replacements for strikers. The cases cited by the Respondent are administrative law judge decisions adopted by the Board without comment. *Armored Transfer Service, Inc.*, 287 NLRB 1244, 1251 fn. 21 (1988); *American Cyanamid Company*, 235 NLRB 1316, 1323 (1978). The Board has never expressed an opinion one way or the other regarding what obligation, if any, an employer has to notify the Union in advance. The Board has required notice to be given in the analogous situation where an employer chooses to exert pressure on the Union during negotiations by locking out its employees. *Ancor Concepts Inc.*, 323 NLRB 742 (1997), citing *Eads Transfer, Inc.*, 304 NLRB 711 (1991). The employer's right to hire permanent replacements in the face of a strike and its right to lockout employees in support of its bargaining

position have both been recognized as economic weapons in the employer's arsenal during a strike. As such, they must serve the purpose for which they have been sanctioned. The right to hire permanent replacements has been sanctioned as a legitimate means for the employer to continue operations during a strike, not as a punitive measure. See *Thurston Motor Lines, Inc.*, 166 NLRB 862 (1967). An employer who hires permanent replacements in secret, without affording the strikers an opportunity to abandon the strike and return to their jobs while still vacant, may be motivated not by legitimate business considerations, but by a desire to punish the strikers by effectively terminating them.

The Respondent's witnesses testified that they made the decision to conceal their plan to hire permanent replacements from the Union out of fear that the Union would engage in harassment and other misconduct to impede its efforts to recruit permanent replacements. The only evidence in support of this claim was hearsay. Although there was a police presence throughout the strike and videotape evidence of supposedly inappropriate conduct on the picket line, the record here is devoid of police reports, tapes, or any other evidence to show that the Respondent had a good faith concern that it would not be able to hire permanent replacements in sufficient numbers to continue operations if the Union was aware of its plans. I find credible the testimony of Brown that, had the Union been made aware of the Respondent's plans in advance, it might have decided

to end the strike and return to work rather than risk the employees' jobs being lost to permanent replacements. In fact, this is exactly what happened when the Union learned that the Respondent had already begun hiring permanent replacements, i.e., the Union held a meeting and recommended that the employees return to work.²⁶

Even assuming the evidence was sufficient to establish that the Respondent had a reasonable concern that would justify its acting in secret, there is other evidence in the record that establishes convincingly that the Respondent's true motive was to punish the strikers. Harper plainly conveyed to his Board of Directors what motivated him to change the Respondent's strategy of using temporary employees, volunteers and non-unit staff to continue operations. The memo makes no mention of union harassment interfering with the Respondent's ability to find replacements. Rather, Harper describes his pre-Christmas surprise as a strategic move to break the solidarity of the union employees at Avery and put pressure on the leadership at both Avery and Miller to acquiesce to the Respondent's bargaining position. The purpose of keeping the plan a secret is clear, i.e.,

²⁶ The testimony of Attorney Psarakis does not establish that the Union knew that the Respondent was already hiring permanent replacements on December 22. I find that, at best, Brown expressed to Psarakis his suspicions that this was happening based on the information he had available. Psarakis admittedly did not confirm these suspicions. Brown's suspicions were not confirmed until the January 3 meeting at FMCS.

to ensure that the Respondent could replace a majority of the unit before the Union found out. This is exactly what McAllister told Cohen when she told him to keep secret their negotiations for the conversion of his temporary employees to permanent employees of the Respondent. Further evidence of the Respondent's independent unlawful motive in hiring permanent replacements is the fact that it continued to hire such replacements after its secret was revealed at the January 3 meeting and even after the Union had expressed a desire to end the strike on January 5.

The testimony of the Respondent's witnesses, Harper and Dr. Parker, is not sufficient to rebut the clear evidence of an unlawful motive found in Harper's December 31 memo. While the Respondent may indeed have been concerned about continuity of care, employee burnout and the cost of using temporary employees, it was Harper's desire to break the Union's solidarity by replacing a majority of the Unit that comes through clearly in his memo. I note that the Respondent had previously, in 1995, weathered a five-week strike immediately before the Christmas holidays without having to resort to the use of permanent replacements and that it was apparently able to continue operations at Miller Memorial during the same period in December 1999 without the need to hire permanent replacements. Harper's memo also shows that the Respondent's strategy of hiring permanent replacements was intended to convey to the striking employees at Miller, "who are new to the

Union and [whose] solidarity commitment is not nearly as solid as at Avery Heights" the threat that they could also lose their jobs if they did not abandon the Union. Harper's reference to the loss of wages for the strikers at Avery is further proof of the punitive nature of the Respondent's plan.

Accordingly, I find that the General Counsel has established, through Harper's December 31, 1999 memo, McAllister's statements to Cohen in mid-December 1999 and the deliberate concealment of its plans from the Union, that the Respondent had an "independent unlawful motive" for hiring permanent replacements for the strikers. I find further, again based primarily on Harper's statements in his memo, that this unlawful motive outweighed the business justifications advanced for the hiring of permanent replacements here. My finding here is not intended to undermine an employer's recognized right to continue operations in the face of an economic strike by hiring permanent replacements. My finding is based on the unique facts presented here where Harper's memo amounts to the "smoking gun" rarely seen in unfair labor practice cases. As the General Counsel argues in his brief, if this case does not fit the Board's language in *Hot Shoppes, supra*, then the phrase "absent evidence of an independent unlawful motive" is truly meaningless and should be expressly overruled by the Board.

Based on the above, I find that the Respondent has violated Section 8(a)(3) of the Act, as alleged, by failing and refusing to reinstate the economic

strikers, including those whose positions had been filled by permanent replacements who were hired in order to punish the employees for showing their support for the Union during the strike. Because the Union's January 5 offer was conditioned on the maintenance of the terms and conditions of the expired contract, the Respondent failure to reinstate striking employees in response to that offer was not unlawful. The unfair labor practice occurred when the Respondent failed and refused to reinstate all the strikers in response to the Union's January 20 unconditional offer.

Conclusions of Law

1. By terminating Patricia Hurdle and Georgia Stewart on January 26, 2000 and by terminating Opal Clayton and Pauline Taylor on February 22, 2000, because of their protected activities in support of the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By failing and refusing, since January 20, 2000, to reinstate its striking employees, upon their unconditional offer to return to work, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. The Respondent did not violate Section 8(a)(5) of the Act, on December 15, 1999, by misrepresenting its intentions regarding the hiring of permanent replacements.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In order to remedy the unlawful terminations of Clayton, Hurdle, Stewart and Taylor, the Respondent must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Respondent be ordered to expunge from its records any reference to the employees' unlawful terminations and to notify them that this has been done.

Because the Respondent unlawfully failed and refused to reinstate all the striking employees in response to the Union's January 20 unconditional offer to return to work, it must now reinstate all strikers who have not yet been reinstated, discharging if necessary any permanent replacements hired during the strike. The Respondent must also make

the striking employees whole for any loss of earnings and other benefits as described above. This would include making those strikers, whose reinstatement was delayed because a permanent replacement occupied their position on January 20, whole for any wages and benefits lost from January 25, 2000 to the date they were in fact reinstated.²⁷ The identity of those employees entitled to reinstatement under this order, the precise date on which individual employees would have been reinstated, absent the Respondent's unlawful conduct, and the amount of backpay required to make each employee whole will be left for determination at the compliance stage of this proceeding.

In his complaint, the General Counsel requested as a special remedy an order further requiring the Respondent to reimburse any employee entitled to a monetary award in this case for any extra federal and/or state income taxes that might result from a lump sum payment of the award. Counsel for the General Counsel has not explained why such an extraordinary remedy is necessary in this case. In the absence of any showing that such a remedy is necessary to effectuate the purposes and policies of the Act, I decline to recommend this additional relief.

²⁷ January 25 is the date the first strikers were reinstated in response to the Union's January 20 offer.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁸

ORDER

The Respondent, Church Homes, Inc. d/b/a Avery Heights, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting New England Health Care Employees Union, District 1199, AFL-CIO or any other union.

(b) Failing and refusing to reinstate any employees engaged in a strike upon their unconditional offer to return to work where it is shown that the Respondent had a discriminatory motive in hiring replacements for the employees on strike.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

²⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Opal Clayton, Patricia Hurdle, and Georgia Stewart, Pauline Taylor and any employees who went on strike on November 17, 1999 who have not yet been reinstated full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the employees identified in paragraph 2(a) whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Clayton, Hurdle, Stewart and Taylor, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records, including an electronic copy of such records if

stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.²⁹

(e) Within 14 days after service by the Region, post at its facility in Hartford, Connecticut copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 1999.

²⁹ *Ferguson Electric Co.*, 335 NLRB No. 15, slip op. at p. 2 (August 24, 2001).

³⁰ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 1, 2001

Michael A. Marcionese, Administrative Law
Judge

APPENDIX:

[EDITOR'S NOTE: THE PAGE NUMBERS OF THIS DOCUMENT MAY APPEAR TO BE OUT OF SEQUENCE; HOWEVER, THIS PAGINATION ACCURATELY REFLECTS THE PAGINATION OF THE ORIGINAL PUBLISHED DOCUMENTS.]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations
Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with
us on your behalf

Act together with other employees for
your benefit and protection

Choose not to engage in any of these pro-
tected activities.

WE WILL NOT discharge or otherwise discrimi-
nate against you for supporting New England Health
Care Employees Union, District 1199, AFL-CIO or
any other union.

WE WILL NOT in any like or related manner
interfere with, restrain, or coerce you in the exercise
of the rights set forth above.

WE WILL, within 14 days from the date of the
Board's Order, offer Opal Clayton, Patricia Hurdle,
and Georgia Stewart full reinstatement to their
former jobs or, if those jobs no longer exist, to sub-
stantially equivalent positions, without prejudice to
their seniority or any other rights or privileges previ-
ously enjoyed.

WE WILL make the above-named employees
whole for any loss of earnings and other benefits
suffered as a result of the discrimination against
them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the
Board's Order, remove from our files any reference to

the unlawful discharges of the above-named employees, and WE WILL within 3 days thereafter notify those employees in writing that this has been done and that the discharges will not be used against them in any way.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting New England Health Care Employees Union, District 1199, AFL-CIO or any other union.

WE WILL NOT fail and refuse to reinstate you after a strike, upon your unconditional offer to return to work, based upon a discriminatory decision to hire permanent replacements for striking employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Opal Clayton, Patricia Hurdle,

Georgia Stewart, Pauline Taylor and any striker who has not yet been reinstated full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the above employees whole for any loss of earnings and other benefits resulting from their discharge, or our failure and refusal to reinstate them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Clayton, Hurdle, Stewart and Taylor, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

CHURCH HOMES, INC. d/b/a AVERY HEIGHTS
(Employer)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103-3599, Telephone 860-240-3524.

App. 191

[LOGO]

CONFIDENTIAL
MEMORANDUM

TO: CHI Board of Directors
FROM: Norman E. Harper [/s/ Norm]
President/CEO
DATE: December 31, 1999

* * * * *

As the new year approaches and we enter the seventh week of a strike by our unionized employees, members of the New England Health Care Employees Union, District 1999, we may be beginning to negotiate seriously. At a negotiation session held yesterday with a federal mediator, representatives from District 1199, and management at Miller Memorial Community, limited movement was made concerning health insurance contributions and contract language, all in the context of a five year contract. Another meeting is scheduled Wednesday, January 5th, for Miller.

A negotiating session is planned for Avery on Monday, January 3rd and we may also see limited movement. We predict only limited movement by the union president Monday because he remains in the mode of bringing a handful of strikers to each meeting. In their presence, he seizes the opportunity to grandstand with his no compromise social justice message and threat of a long-term strike, as written in his letter, which you received yesterday.

However, while he postures and schedules meetings a week apart, we are making progress:

1. *Quality and Consistency of Service* to our residents, patients and clients remains higher than before the strike.
2. Morale among staff and management remains high and determined. The spirit of teamwork seems undiminished after long workweeks that included shifts through the Christmas holiday. Although our staff and managers are clearly tired of this stress, they have learned to take their additional assignments and long hours in stride.
3. Thanks to their efforts, we continue to fair well in the eyes of the state inspectors. We may not be flawless, but I can assure you that we exceed their standards and meet a higher standard we set for ourselves for excellence in resident care.
4. We continue to admit new residents and short-term patients at both villages.
5. I remain especially impressed by the efforts of our volunteers, many of whom are themselves in their 80s. For some, this current strike is their second, even their third experience with a job action by 1199. These volunteers amaze us all with their energy and their dedication to the well being of our residents.

6. As a well-executed surprise event the day before Christmas, we began to permanently replace striking workers at Avery. These new employees have some distinct advantages: they are very pleased to have the job for the money that we currently pay; they have fine work ethics; they want to learn; they are less expensive than temporary workers; and they bring predictable stability for the future, when the strike is over, because they say they want to work here for a long time. So far, we have hired 104 permanent replacements at Avery, replacing 60% of those on strike. If Mr. Brown refuses to seriously negotiate in good faith, we plan to add one or more permanent replacements each day. We have him in a real bind at Avery.
7. We have not yet begun to add permanent replacements at Miller, but the threat is clearly before Mr. Brown. We also reminded Mr. Brown and the strikers that we are considering the option of no longer paying for their health insurance while they are on strike. The objective of the health insurance tactic was to cause the strikers to gang up on Mr. Brown and demand that he compromise to achieve a contract or they will come across the picket line. Yesterday's movement at Miller may be evidence that the health insurance threat, along with our permanent replacement success at Avery, is working. Remember, the Miller workers are new to the union and their solidarity commitment is not nearly as solid as at Avery Heights. It

could also be said that we have Mr. Brown in a real bind at Miller.

8. Remember, this union has no strike fund except for the few members that put in 40 hours a week on the picket line. They receive \$100. Depending upon their shift differential status, these workers have become accustomed to earning between \$487 and \$580 per week. Because of this disparity, we know that some former workers here abandoned the strike and have obtained employment elsewhere.

Your CHI Board of Directors Personnel Committee received a briefing yesterday from our chief negotiator, which also afforded an opportunity for questions and answers. Consistent with the unanimous vote of confidence and support the entire Board expressed at our last meeting, the Personnel Committee is solidly behind Management and our strategies. Thank you very much.

We continue to be the targets of printed attacks by the union. Their charges are distorted and sometimes are dramatic misrepresentations of fact. A pamphlet entitled "A Christmas Carol," that portrays Church Homes, Inc. as Scrooge, received mass mailing last week. A letter from Jerome Brown, the union's president, was also mailed this week to residents and neighbors as well as to you. The letter, like the pamphlet, is filled with erroneous information and irresponsible charges. I suppose in the absence of press coverage especially in the Hartford area for the

strike, the union has decided to create its own biased reporting. We are advised by counsel not to respond, and we agree. However, in all honesty, it is difficult.

The millennium closes today. I am certain that the new year will usher in an end to the strike, and perhaps a new era in resident care. For the meantime, my best wishes for your happiness in the year ahead.

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**OFFICIAL REPORT OF PROCEEDINGS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:
CHURCH HOMES, INC.,
d/b/a AVERY HEIGHTS,

Case No.
34-CA-9168

Respondent,

and

NEW ENGLAND HEALTH
CARE EMPLOYEES UNION,
DISTRICT 1199, AFL-CIO,

Charging Party

Place: Hartford, CT
Date: March 13, 2001
Pages: 1 through 161
Volume: 1

* * *

[70] of it, for most of the time on contributions to the training fund, and they ended up with a lower contribution rate to the health and welfare fund than the other facilities, although over the term of the contract, it might've averaged the same, but they started at a higher number than the other facilities and

ended at the lower number, 18% of gross payroll, when everybody else was at 21.

Now they started at a little higher and we were able to, Trustees of the benefit fund were able to justify maintaining benefits because over the term of the contract, the contributions were roughly equivalent in terms of percentages as an average percentage. But they ended up at a lower level coming into the new contract than everyone else. So they broke the pattern in substantial ways in 1995.

Q Now, Mr. Brown, were you involved in the decision to end that strike?

A Yes, I was.

Q Why did the Union accept these terms that were clearly less than you were seeking?

A When you negotiate and when you deal with workers and their jobs and their families and so forth, you make compromises based on what you think is in the best interest of the members, and what the power relationships are.

I think at that strike in 95, maybe 30 of the 175 members of the Union had crossed the picket line. It was our best judgment

* * *

[101] last beyond New Year's and perhaps a long longer?

A I said that if the positions didn't change, I don't know how to expect how a strike, how long it is. If the positions didn't change, I expected it to be a long strike.

Q Did you ever put a timeframe on it?

A No.

Q With Tom?

A No.

Q Is that something you would typically tell an employer in a strike situation?

A Yeah, I mean, you don't say anything you think is not believable. You know, if we had 75% of the workers were crossing the picket line, I wouldn't say to an employer "Oh, this strike is going to go on forever", because it makes me look stupid. But this one, we expected that the strike would last a while if the positions didn't change. And we expected that because the workers were out and they were determined, and I was trying to convey to him the mood of the employees who were really outraged at the fact that they were significantly behind other workers, and outraged that the proposals, that if I wanted to settle the strike on the conditions that Church Homes had offered, I would not have been able to have the members vote for it. I mean I was trying to convey that to him, that they were really a determined group of people here who felt that their conditions needed improvement, substantially, and that this would go

on if there [102] were no change in either parties' position.

Q And this conversation you had, whatever date it was, how did that phone conversation end?

A That one?

Q The particular one we were just talking about.

A Well, all of those conversations ended, phone conversations ended, with me saying "Tom, give me a ring if something changes on your side that I need to know, and I'll do the same with you". And it was always, I mean I was the initiator of the phone call and I was the initiator, and he said "Yes, you know, I would", he would do that. But I was the initiator of the phone call and I said that at the end, and he agreed. That's the way the conversations ended.

Q And after those first couple of weeks, talking about, say, the first couple of weeks after the strike began, did your phone conversations with Tom Cloherty continue or did they . . .

A At some point, three, four weeks in, I stopped calling him because he never offered any information, any suggestions, any, well, Jerry, any explorations of other ways to resolve things. Cloherty, his demeanor on the phone was, I said before, nonresponsive, it was. He said "Yes" when I said "Call me if something changes". When I asked if anything has changed, he would say "No". He wouldn't expand on things. So I stopped calling him after a while.

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Q Still in December of 1999, did you speak to
any other

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**OFFICIAL REPORT OF PROCEEDINGS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

Case No. 34-CA-9168

In the Matter of:

**CHURCH HOMES, INC.,
d/b/a AVERY HEIGHTS,**

Respondent,

and

**NEW ENGLAND HEALTH CARE EMPLOYEES
UNION, DISTRICT 1199, AFL-CIO,**

Charging Party

Place: Hartford, CT

Date: March 14, 2001

Pages: 162 through 379

Volume: 2

* * *

[181] WITNESS: No problem; no problem.

Q Now yesterday you testified about the 1995 negotiations at Church Homes and at other places; is that correct?

A Yes.

Q Okay. Now you had a number of Nursing Homes – contracts that were expiring November 1st of '95?

A In that area.

Q In that area . . .

A Right; correct.

Q . . . October 20th, . . .

A Exactly; exactly.

Q And as was the practice, you wanted to get all the Nursing Homes on to a pattern; right?

A Yes.

Q And in 1995, Avery told you they didn't want to be on the pattern?

A That's what they said.

Q Okay. And again, there were three common items – three primary items for the pattern, the wages, the benefit contributions, and common expiration dates? And those were at issue in '95?

A Those were three of them; yes. And they were definitely at issue in '95.

Q Okay. Okay. And the strike at Avery began November 16th of '95; on or about?

[182] A Yes.

Q Now did you have lunch with Norman Harper during the strike in 1995?

A I don't think so.

Q You don't think so?

A I don't remember anything . . .

Q Okay.

A - I know he was involved in the negotiations at the Mayor's office to end that strike. I do not remember meeting him privately.

Q Okay. Ultimately, you entered into a contract with Avery that was not on the pattern; right?

A That's correct.

Q There was a different benefit rate you testified about yesterday?

A Yes.

Q Different pay rates that you testified about yesterday?

A Yes.

Q And a different expiration date?

A Correct.

Q So the Avery contract expired a year after all the other ones you had negotiated in '95?

A That's right.

Q Okay. And it's fair to say that you weren't happy with that result?

[183] A That's fair to say.

Q Okay. Now directing your attention to November of 1998, most of the contracts that you had negotiated in '95 were up at that point; right?

A Yes.

Q Did you enter into new contracts then, or did you do something else?

A No; we did something else. We – we held those contracts; and together with a group of newly-organized places, we set a common deadline in the Spring when the Legislature was in session, to try and negotiate all of them on a – as much of a pattern as possible – and to get the Legislature and the Governor involved to try to improve the funding.

Q So you moved from November, which is traditionally election time, to March, which is the time the Legislature is in session?

A That's correct.

Q Okay. And based on what you said yesterday, you were successful in pressuring the Legislature to give some money?

A I don't think they'd like to say it that way; no.

Q I'll let you rephrase it in a different way.

A We – as a result of our efforts and whatever else was going on in 1999, in the Spring, the Legislature and the Governor appropriated a great deal more money for Nursing Homes than they had originally proposed.

Q Okay. And in about April or so of '99, you entered into

* * *

[200] there.

Q Okay. You were on the picket line, though?

A Some of those days, yes.

Q Okay. And how many people were on the picket line in the first week of the strike?

A It would vary as to time of day and, you know, shift change. Normally, at shift change, there would be more than at other times; but in the first week of the strike, I would say 125 people or so participated at one time or another. The number on the line at any point might – might have varied from five to fifty . . .

Q Okay.

A . . . at various times.

Q During shift change, they would have more people there?

A Normally.

Q Okay.

A Normally.

Q And part of that was to make it difficult for the replacement workers to get across the line; is that right?

A You picket to ask people not to cross your picket line, whether they're workers, replacement workers or suppliers or whatever; you're picketing for the purpose of discouraging people from crossing; yes.

Q Okay.

A And you do so legally, . . .

[201] Q Uh, huh.

A . . . and sometimes people cross; sometimes people don't.

Q Okay. Now other people went to Avery Heights during this time, like residents?

A Resident - there was only one entrance . . .

Q Uh, huh.

A . . . - there were two entrances to Avery Heights that were generally used. One was closed off when the strike started, so the entrance on New Britain Avenue - so everyone who went in and out, to my understanding, used the entrance and exit on New Britain Avenue; and that included residents who drive themselves, some of the folks in the apartments drive themselves, included visitors. It included ministers or whatever right - who might be attending to

the needs of the patients; whatever doctors, delivery people, replacement workers, et cetera.

Q Based on your observations, how, if at all, did the picket – the picketers' treatment of, let's say family members who were coming to visit a resident, differ from someone who was identified as a replacement worker, as they crossed the line?

A If the picketers knew family members or knew the resident or knew that – that they were not replacement workers, they would wave them through quickly, as quickly as possible. They wouldn't wait for the police to – to ask them to move out of the way. There were always police there. The picketers would [202] attempt to be much more courteous, quieter to visitors that they knew and residents, et cetera, than they were to replacement workers. Replacement workers, they would holler, "Scab"; they would try to make it – I mean that's what you do on a picket line; so . . .

Q You want to make it uncomfortable for the "scab" to cross; right?

A Want to make them think about what they're doing.

Q Okay. Okay. And you didn't just limit that strategy to the picket line; did you? You went and did other things besides yell at people as they crossed the picket line?

A We leafleted some scab's neighborhoods. At one point later on in the strike or lock-out, whatever, we picketed some . . .

Q I want to focus on the period in the first two to three weeks of the strike; so if you're going to go beyond that . . .

A Right. No; I – well then, it's hard for me to remember now when we did what. I mean the first two or three weeks of the strike, if we knew that one of our own members were crossing the line; and we did know some of our own members crossed the line, we probably went to their house or called them or visited them or tried somehow or other to meet with them to talk to them to discourage them from doing that. Sometimes we were successful.

The – but I didn't – I personally didn't do any of that, but I mean, it's the normal thing you do. At some point, [203] we leafleted some scabs neighborhoods of our own members, saying that they were crossing the picket line; but I don't know if that was in the first three weeks or not.

Q Let me show you a three-page document – it's actually three separate pages. They're not stapled together. If you could take a look at these documents and let me know if you recognize them.

JUDGE MARCIONESE: Are these marked as . . .

MR. MURRAY: Marked as Respondent's 2 for identification.

A I've seen these before, and they – I wasn't involved in their production. I didn't see them when they came out; but they look like they're – except for this – the first one – I don't know where that was produced; but the other two are definitely stuff that looks like the stuff we, you know, normal things we put out in the Union Office. And I've seen them all. I've seen all three of them.

Q Uh, huh.

A I don't know where this one was produced; it doesn't look like anything that we . . .

Q But the second two pages are things that you – that came out of your office?

A Yeah; they would have come out of our office.

Q Okay.

MR. MURRAY: I'd ask that the first page be taken off, and [204] the two-page document be admitted as Respondent's 2.

(Exhibit R-2 identified.)

JUDGE MARCIONESE: Any objection?

MR. QUIGLEY: Could I inquire as to the relevance? This, I don't think is tied into the – the case that we're trying.

JUDGE MARCIONESE: All right. And what are you offering this for?

MR. MURRAY: I'm offering this to show that it was part of the Union strategy, which I think Mr. Brown has admitted, to try to discourage replacement workers from crossing the line.

JUDGE MARCIONESE: Why isn't that a given in any strike situation?

MR. MURRAY: Well, . . .

JUDGE MARCIONESE: I mean what other purpose would the Union have in being out there and striking, but to prevent people from crossing and going to work; and put pressure on the Employer? How is that going to be relevant in terms of assisting me in deciding the allegations, the merit of the allegations?

MR. MURRAY: At this point, I'll withdraw Respondent's 2.

JUDGE MARCIONESE: You can either withdraw it and leave it marked; and then if you want to, as the case goes on, offer it again when there's more evidence in the record that might show the relevance; but at this time, I don't see the relevance of it.

* * *

[209] in the West End of Hartford, either on New Britain Avenue or – or I forget the name of the street, but a big street, but I don't know at what point we found that out.

Q Okay. Are you aware of any vandalism at the offices of any of the suppliers of temporary replacements?

A No; I'm not.

Q You're not aware of that?

A No.

Q You never heard any reports of that?

A Absolutely not.

Q Okay. Yesterday, you testified about a phone conversation you had with Mr. Cloherty in early December of 1999; do you recall that?

A Phone conversation with Cloherty when?

Q On or about December 2nd?

A I remember being asked about that; yes.

Q And you weren't sure what the dates were, but you said you talked to Mr. Cloherty quite a bit?

A Yes.

Q Okay. Did you ever tell Mr. Cloherty in one of these phone conversations that -- that the strike could go beyond New Years and perhaps a bit longer?

A I might have said something like that. I know I testified yesterday that I said that if things didn't change on either side in terms of the positions that the parties were taking,

* * *

[267] A No.

Q Did you ever speak to Mr. — I'm sorry; did you ever speak to Dr. Parker about more instructions as to who you should ask?

A Did I ever speak to Dr. Parker regarding?

Q More instructions as to who to ask to become a permanent employee?

A I don't really understand the question.

Q Well, let me try it this way: Was it your understanding that you were to ask all of the people that worked for Class Act if they wanted to become regular employees; or just certain ones that you . . .

A Certain ones that I thought that would be appropriate for the job.

Q Okay. And so that's the instruction that you were aware of?

A Uh, huh.

Q Okay. I'm sorry; you can't — you have to say yes or no.

A Yes; sorry.

Q And did you then speak to the workers that you decided were appropriate for Avery Heights?

A After what — after the instruction from Dr. Parker . . .

Q Yes.

A . . . yes.

Q Okay. Do you have any sense of how many workers you first spoke to that – in that period of mid-December, 1999?

[268] A I have no idea, but I mean I . . .

Q I'm just speaking with terms of the Class Act folks.

A Honestly, I don't know at that particular point who was working with me and who wasn't; and I didn't accept a lot of them, and I interviewed more after; so I mean I can't specifically tell you who was working for me at that specific time. I mean I interviewed a lot of people from – from both companies.

A All right. More from Triple-A apparently?

A No. No; not necessarily; no.

Q Didn't Triple-A provide the bulk of the temps that were initially sent to the Housekeeping Department?

A Say that again.

Q Didn't Triple-A . . .

A I dealt with both companies.

Q Right. And in comparing the two, Triple-A versus Class Act, would it be true that Triple-A

provided far more employees in that time period than did Class Act?

A I'm not necessarily sure that's true. I interviewed several people from both companies; and I rejected a lot of them, and I took a few from each; but I don't think it was either-or – either Company that I dealt with, more or less.

Q Okay. Let's just stick to the Class Act people again. Would you say you were successful in securing agreement from more workers from Class Act that wanted to work there; or not so [269] many workers?

A It was equal amount. Honestly, I can't – I – I don't know. I rejected a lot of them, and I hired some of them.

Q I'm talking about the folks that were actually hired as temps and were on the scene.

A Okay.

Q That's the only universe of employees that I'm concerned with. Out of the people that you rejected out of hand and sent home, and they never worked for Avery Heights; I'm not asking about those people.

A Okay. So you're asking me about temps that I hired from . . .

Q Class Act.

A . . . Class Act; okay; go ahead.

Q Out of that group, did you ask every single temp that was then on board at Avery heights to become a member –

A No.

Q I'm sorry; to become an employee?

A No.

Q So you chose which ones?

A Correct.

Q Okay. And did you call mr. Cohen up and tell him that you were doing this?

A Did I specifically tell him that? He knew that I was not accepting some and accepting some; so I mean I'm sure we had the [270] conversation with either German or Scott regarding it.

Q Okay. I'm talking about this – this business of asking temp workers that work for another Company – okay, they're employees of Class Act at the times that they have been talked to by you; correct? In mid-December, '99; can we agree on that?

A I'm sorry.

JUDGE MARCIONESE: Are you asking her – these are temp employees that have already been hired and are . . .

WITNESS: Right.

Q I'm sorry.

A I'm really confused as to what you're asking me.

Q I don't want to confuse you. What I'm trying to do is pin down the people that you were talking to . . .

A At what time?

Q In mid-December, 1999.

A Mid-December, okay.

Q Before -- before this conversation with Dr. Parker, . . .

A So they're temporaries.

Q They're all employees of Class Act; correct?

A And they're temporaries at this point?

Q Yes; because . . .

A I'm asking you what you're asking me.

Q They all work for Class Act.

A So they're temporary, and they work for Class Act; go ahead.

[271] Q Right. Out of that universe of people,

A Uh, huh.

Q . . . when you started talking to those people . . .

A Uh, huh.

Q ... and asking them to become Church Homes employees; ...

A Right.

Q ... at that point, did you then contact Scott Cohen, before you talked to the first employee – whoever it was – did you call Mr. Cohen to tell him this was what you were doing?

A No. What I'm saying to you is: I – before I did that with his temporary people, I had called Scott prior to talking to them.

Q You just told me a second ago, no..

A No; I misun – I'm clarifying something.

Q Okay.

A Because you had me a little confused.

Q All right.

A I would not go to his temporary help without talking to Scott first regarding what Dr. Parker's decision was.

Q All right. So you cleared it with Scott first?

A Yes.

Q Okay. And what did he say when you first had a discussion with him, whenever it was?

A I don't exactly recall a conversation when we got down to talking about monies.

[272] Q Okay. Who brought up the issue of monies?

A I don't know whether it was him or I, but we had to talk it sooner or later; so I'm not sure who brought up – who brought it up.

Q Had Dr. Parker instructed you that some of the temp agencies might not be too thrilled having their employees essentially taken?

A I don't recall that; no.

Q Okay. So did Mr. Cohen raise the issue of money?

A I – like I said, I don't know who brought the subject up when we had the conversation.

Q What as your agreement with Mr. Cohen, as best you can recall?

A He wanted \$1200 per person, and I had said that we were paying \$1100 from Triple-A, and they agreed on paying \$1100.

Q Okay. So you bargained with him?

A Yeah.

Q Essentially?

A (No response.)

Q Yes or no?

A Yeah; sorry; yes.

Q And so you had already started this process with Triple-A, I take it – since you'd already set a rate of \$1100.

A I guess so; I'm not sure. I mean I had a price in my mind; so I'm not quite sure of the answer to that.

[273] Q Do you know who set the \$1100 price?

A I'm sorry; say that again?

Q Do you know who set the \$1100 price?

A I do not know; no.

Q It was not your decision?

A With Triple-A?

Q With anybody?

A No.

Q Okay. But you knew there was a standard set, apparently, of \$1100, and you told Mr. Cohen, when he asked for \$1200; no; we're only paying \$1100; is that fair to say?

A That's fair to say.

Q I'd like to show you a document I've had marked as General Counsel's Exhibit 7(a) through (h) and ask if you can identify this group of invoices to Class Act.

JUDGE MARCIONESE: This is what number?

MR. QUIGLEY: 7(a) through (h).

A I can identify the two that have my handwriting on it.

Q Okay. Well, is that your name on the top of Page 7(a)? "Attention Gayle McAllister"?

A Yes; yes; it is.

Q In fact, does your name appear on all but the last two documents?

A Yes.

Q Can you identify the last two?

[274] A I identify the ones with my handwriting on it. The ones that have the written names on them, because that's my handwriting.

Q So that would be General Counsel 7(c) would be the first one?

A 7(c) and 7 (e).

Q Okay. Let's talk about 7(c) for a minute. This is an invoice that was sent to you for \$5500 from Class Acts on about December 22, 1999; correct?

A Right.

Q And the invoice was typed and simply stated "Janitorial five-personal"; do you see that?

A Yes.

Q And then you wrote in your handwriting the names of the five individuals; correct?

A Correct.

Q And, in fact, they were – those were people who were – well, let me ask you:

Were those people that were already there at the time and were converted on about that period; or were they people who were just sent out on that – in that week?

A Okay. I don't recall. I don't know whether they were working prior to me or not; because, like I said, I interviewed several – several people and rejected several; so if you're asking me if these worked prior to this; I'm not sure. I . . .

[275] Q Is it fair to say, Ms. McAllister, that there was a mix of people in this group? There were people who were both initially referred by Class Act as temporary employees and then converted to permanent status some time in mid-December; as well as people who were simply referred by Class Act in the first instance after December 15, 1999; and become – and made permanent employees; is that true?

A A mix. Some . . .

Q Two types of employees.

A Some that worked prior and some that I hired after I interviewed them.

Q Some that came in after December 15, 1999; and that you hired without having been – you hired as employees of Church Homes without them being on the temp payroll first; yet they were referred by Class Act?

A Possibly.

Q Okay. In fact, did you not make an arrangement with Scott Cohen, towards the third week of December, in which he agreed to simply send you bodies?

A I never accepted just bodies. I interviewed people thoroughly before I wanted them on the floors. So I mean he didn't – he might have thought that he was just sending me bodies; but I interviewed people thoroughly. I didn't just want anybody to go up on the floors and work with the residents. That's not how I operate.

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**OFFICIAL REPORT OF PROCEEDINGS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

Case No. 34-CA-9168

In the Matter of:

CHURCH HOMES, INC.,
d/b/a AVERY HEIGHTS,

Respondent,

and

NEW ENGLAND HEALTH
CARE EMPLOYEES UNION,
DISTRICT 1199, AFL-CIO,

Charging Party

Place: Hartford, CT
Date: March 26, 2001
Pages: 891 through 1085
Volume: 6

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[905] A Yes.

Q And it was settled after a few weeks?

A It was approximately, well, the strike was settled after four weeks. It was a five week time period.

Q Now I want to direct your attention to 1998.

A Uh-huh (Indicating affirmatively).

Q Did you have any discussion with Jerry Brown concerning Avery?

A Yes, in 1998 I was involved in negotiations with another client, and then I had a meeting with Mr. Brown at District 1199 headquarters. And the purpose of that meeting was because of the other client's concern about the ability to meet the demands that the Union was proposing in 1998. And so we had some discussions and we had some discussions about, during the course of the discussions, basically we were trying to calculate, or Mr. Brown was trying to calculate what level of Medicaid rate, daily reimbursement rate, would have to be achieved to meet the Union's demands. And we had that discussion.

After that meeting, as I was getting ready to go, I was standing in his office, and it was just the two of us. I was standing by his door. And he asked me, "Are you going to be doing Avery?", and I said, "I presume I am". And he said "You know, it'll be different this time, the economy's different. It'll be harder to get people to come to work or come back to work".

* * *

[910] A I was there with Miriam Parker.

Q On behalf of the Union, who was there?

A Louis Guida, Almena Thompson, and there were approximately maybe 75 employees.

Q So you were in a big room?

A Yes.

Q Now this Respondent's Exhibit 10, does that contain economic proposals?

A No, it didn't. I told the Union at the outset of the meeting that I would make a comprehensive, or the home would make a comprehensive proposal on language issues. The Union had presented certain language issues in the initial meeting, in which the Union represented were, essentially they said "We took language that was in the pattern and we incorporated that" in their proposals. Because Mr. Guida also had said in that meeting that Avery was not going to be different. That it should have the same contract as 50 other nursing homes, and that it had to get back on the pattern.

So, in this meeting I presented a counter proposal, and I described it as saying that if there was no reference, then the existing contract language would continue. I responded to several of the Union proposals by either agreeing to them or making counter proposals, and this was intended to be a counter proposal on all language issues.

Q If you could direct your attention to the last page of

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[916] JUDGE MARCIONESE: Yes, I understood that your earlier comments were just made by the employees, the members of the committee that might've been witness at the negotiations. But now this is someone at the table, saying that?

THE WITNESS: Well, to correct. In the first meeting when Mr. Guida specifically said that he wanted the contract to be similar to the other 50, wanted to be the 50, wanted Avery to catch up and Avery was behind. And then at this particular meeting, Mr. Guida said that the seven years was a joke. I responded by saying that, "Look, we can move off that, but we would like you to move off your 16 month contract".

I don't know if there's a question pending.

MR. MURRAY: No, there's no question pending.

JUDGE MARCIONESE: Well, actually, you did ask if there was a response just to that, though, the seven year contract? I can't remember if you had asked more broadly if there was any response.

Q Well, was there any particular response to the monetary increases proposed?

A Yeah, I mean the response was that Mr. Guida said that we would have to get to the pattern.

He said that the Union had a strike vote scheduled for November 4th and that we had to get serious, and that they wanted us to get to the pattern.

MR. MURRAY: I'd offer Respondent's 11.

JUDGE MARCIONESE: Any objection?

MR. QUIGLEY: No objection.

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[920] Q Was there a discussion of the wage increases and the economic terms?

A Um . . .

Q If you don't recall, that's fine.

A I'm trying to think for a second. I know that we had, at every meeting, you know, there was a discussion about how we're getting to the pattern and that we had to get to the pattern, and other people were at the pattern. So there was discussion. And my response at that meeting, I believe, was that "You guys can't just sit here. You have to, you know, we want to negotiate".

Q So you were encouraging them to make a proposal?

A Right.

MR. JOHN CREANE: Objection, Your Honor. I mean it's leading, it's self-serving.

MR. MURRAY: I withdraw the question.

JUDGE MARCIONESE: Okay, you're withdrawing it?

MR. MURRAY: Yes.

Q Mr. Cloherty, there's a document in front of you marked Respondent's 13. Do you recognize that document?

(Respondent exhibit 13 marked for identification)

A Yes, it's a proposal made on October 28th.

Q Was October 28th the date of your next meeting?

A Yes.

Q Where was that meeting held?

A That was also at the VFW in Newington.

* * *

[924] proposals.

Q Did Mr. Guida make any proposals that night?

A Mr. Guida, I'm trying to think. Yeah, Mr. Guida said that he had a proposal and he proposed that there be a wage re-opener on March of 2001. He said that we would still have to get to the \$13.20 rate and the \$13.60 rate, but he proposed a, he said he'd go to a three year contract on the language, but he proposed a wage re-opener on March of 2000 with the Union right to strike.

Q Did you have any response to that?

A Yeah, I had a couple of responses. I mean, first of all, I had, I said to the Union, again I was pushing the Union to make an economic response. And then I said that as far as I could see, a 16 month with a re-opener with the right to strike was really not what we wanted. It was effectively the same as a 15 or 16 month contract.

Q Did Ms. Thompson say anything about the term of the contract?

A Yeah, she said that they had to have the March expiration date. She said "We can't change it". No, she said, "We won't change it. We can't change it".

Q When was the next negotiation session, do you recall?

A November 16th.

Q Were the same parties there?

A Yeah. The way that session, to get more people there, Jerry Brown had proposed to me in a letter a joint bargaining session with both Avery and Miller. And I responded to him by saying we

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[926] A So Mr. Brown started the meeting by saying that we could be here for a long time and resolve both contracts or we could be here for a short period, or else we could just be wasting our time. And that he didn't want to waste his time. And he said

that there was a fundamental premise that had to be resolved, and that premise was that both Avery and Miller would have to agree that they would get to the pattern. And that a fundamental premise. And unless they were going to agree to get to the pattern, we were going to be essentially wasting our time.

Q Did you have a response to Mr. Brown?

A Yeah, I asked Mr. Brown, "Well, tell me exactly what you're talking about when you say "get to the pattern"". And he responded by saying, "Wages of \$13.25", which was actually 11 cents higher than the Union's last proposal, "8% into the pension fund", which actually the parties had essentially agreed to, "1% into the training fund, and 21% into the health and welfare fund". So he did define that as the pattern.

And I said we could get to the number \$13.60. I'm sorry, and Mr. Brown also said that the term would be March of 2001 or a re-opener. So I responded, and I said we could get to the \$13.60 number, but not in the timeframe that you want, not by, not at 15 months.

Q Was there any response from anyone when you said that?

A Yes, as I was sitting, there was a person on the right hand side of the room, and I believe it was Pauline Taylor. Jerry

* * *

[930] concept".

Q Were there any further proposals made that night?

A No.

Q Directing your attention to early December of 1999. Did you have a conversation with Mr. Brown?

A Yeah, on December Friday, I think it was December 2nd, I was in Worcester, and I called the office and I received a message that he had called me. So I called him from my car phone in one of the rest stops at the Mass Pike. And he called and said "Is there any news, anything to report?", and I said there wasn't really anything happening. And then he said, "You know, this isn't going to be like the last time when people came back to work". He said, "This is going to be a long strike. It'll go to New Year's and well beyond". And he said that he had an \$8,000 advertising budget, \$8,000 weekly advertising budget, and that he was going to start to roll that out, and that I should tell Church Homes that this was not going to be a short strike like the last time, but this was going to be a long strike.

Q At any time in the month of December, did Mr. Brown ask you about permanent replacements?

A No.

Q Did you have any further discussions with Mr. Brown after December 3rd, before December 2nd, and before January 3rd?

A No, I did not speak with him. I spoke with, I had a couple of conversations with the mediator for purposes of setting up

* * *

[1057] MR. HARRINGTON: I'm going to restate them.

BY MR. HARRINGTON:

Q Dr. Parker, what type of car do you drive?

A I drive a green Audi.

Q Is that the car that you drove in November, 1999?

A Yes.

Q And what does your license plate say?

A 786MAX M-A-X.

Q And I asked you this before but it was while we were playing the tape. Did you recognize anyone in that tape?

A Yes, I did.

Q And who did you recognize?

A Pauline Taylor.

JUDGE MARCIONESE: I don't know if it was on there but you said that you identified her as the woman wearing the coat walking with the man with the bullhorn.

THE WITNESS: Right.

BY MR. HARRINGTON:

Q I would like to shift your attention to another topic. I would like you to describe to the Court how Avery Heights staffed its operations during the first few weeks of the strike.

A During the first few weeks of the strike all managers, supervisors, non-union staff essentially worked 12 hour shifts four, five or six days a week. We went to two 12 hour shifts in the Nursing Department. Staff members who worked in other [1058] departments like Recreation, Social Work, Reception, Bookkeeping picked up the responsibilities of the workers who went out on strike so they may have done housekeeping before they started the hours - before they started their work and the hours after they started their work. They did housekeeping, laundry, dietary.

For the Nursing Department we had to hire temporaries to fill in for the CNA's who were on strike and we worked with temporary employees from the pools the nursing pools. We also had volunteers who also helped us doing some non-essential work. Some were actually trained according to the state guidelines to be able to feed people but the number of volunteers that really wanted to do that were few. They wrapped silverware et cetera.

Q You mentioned that employee staff that did not go out on strike were expected to work 12 hour shifts. Were those mandatory or voluntary?

A No. These were mandatory 12 hour shifts except in extreme circumstances where there was a valid reason.

Q And how effective was this sort of staffing structure using volunteers, extended staff or staff working extended hours and temporaries?

A It's okay for a short run. It's not okay as things progressed because what happens when your staff is working long hours like that there tends to be a burn out factor and as we moved into the end of November after Thanksgiving staff began to get worried. They began to get worried about the holidays and about their [1059] commitments for the holidays. They were growing tired and I could see -

MR. J. CREANE: Objection Your Honor. We're getting an awful lot of hearsay in here unidentified.

JUDGE MARCIONESE: Do you want to -

MR. HARRINGTON: Well for one thing I don't think it's hearsay if it's based on her observations of her staff but more importantly Your Honor we're offering this for the state of mind of Dr. Parker and not for the truth of the matter.

JUDGE MARCIONESE: All right. All right. Although she did reference to what people were saying.

MR. HARRINGTON: Okay.

JUDGE MARCIONESE: So maybe if you recall anything specifically but I don't accept it for the truth but just information that was provided to Dr. Parker upon which she made any decision. Go ahead. Do you have any more specifics about what you heard?

BY MR. HARRINGTON:

Q Yes. Let me actually focus your attention Dr. Parker did you observe your staff getting tired?

A Yes.

Q And what sort of things did you observe?

A I observed that they were getting bags under their eyes. I made it my duty to be there early in the morning between 5:30 and 6:00 before the 7:00 shift came in so that and we served breakfast [1060] before that so that I could sit and talk with them to see how they were doing and this is what they shared with me. These are nurses. These are my rec people who were doing housekeeping or dietary before they went to do their regular jobs and they expressed by the end of November or the beginning of December that they were worried about the upcoming holidays. That they were hired and I knew they were tired. I heard it. I

saw it. They wanted to know if we were making any progress in negotiations.

Q Let me ask you another question. Did you see any problems with using volunteers on an ongoing basis?

A Volunteers are not the most reliable resource. They are not going to clean toilets and do laundry and work in a dietary department. Volunteers are a femoral and when the holidays came -

JUDGE MARCIONESE: Off the record.

(Discussion off the record.)

JUDGE MARCIONESE: Back on the record. Dr. Parker, do you want to begin again?

THE WITNESS: Yes. I wanted to say that volunteers aren't a femoral resource. They have lives of their own. They have responsibilities of their own. We're thankful when they are able to come and serve in a volunteer capacity but by the time Thanksgiving rolled around they were busy with their families and through the month of December they may have come back shortly but [1061] they were busy with holiday preparations so they were not a group of people that we could count on 100 percent. They were wonderful and wonderfully supportive but they weren't going to be there at 7:00 in the morning or 7.00 at night for a 12 hour shift.

BY MR. HARRINGTON:

Q And how about Avery's use of temporary workers. Were there any problems using those individuals for a long term basis?

A For a long term basis yes.

Q What were the problems as you saw them?

A Okay. They were two-fold. Number one when you deal with a temporary worker you have to orient them and train them according to your policies and procedures according to how Avery works. So for every temporary person who came to Avery, we did approximately a two hour to two and a half hour general orientation and then at least an hour and a half orientation to the individual department. That -

Q Just to interrupt is that orientation required by anyone?

A Yes, it's required by the state.

Q Please continue.

A That meant for every single person who came in. It didn't mean that the person who came the first day would necessarily be the person who came the second day although we did try to have some kind of consistency but it did not always happen. We were not always satisfied with the service and we had to go for the next temporary person and then go through the same process again. We [1062] oriented and trained a number of people a large number of people. Not all came back.

Q And once those temporaries were orientated to Avery, did you find that they performed their jobs adequately?

A They needed to be supervised more closely than a staff that was your own. They needed to be reminded that our policies may be different than what they were used to. That we had an expectation that you needed to be able to start to make a relationship with a resident.

I think I started to say before that we pride ourselves on relationships with our residents. It's really essential especially in the skilled and intermediate care facilities because in our skilled facility many, many of the residents don't communicate verbally. They communicate through non-verbal means. They have dementia. They are frail. They are total care patients and they communicate their needs in a way that a care giver gets to know over time and there's an essential element of relationship that's required to deliver good care there. With a temporary that becomes problematic.

Q Have you ever heard the term continuity of care?

A Yes, I have.

Q What does that term mean?

A It means that there is a consistency in the care giving force. The same care giver or a team of care givers on a specific unit will render the care to let's say there are 40 residents [1063] living on a unit.

There may be a team of six people who deliver care to residents on that unit and they will be the same people consistently over a seven day period of time.

Q And why is that important?

A Because that builds relationships. It helps residents who are frail and dependent to feel comfortable and know the touch and feel of a care giver.

Q Do -- which departments have interaction with the residents?

A The Nursing Department of courses. Nurses and CNA's get to know the idiosyncracies of the residents. Housekeeping and laundry who go in to clean the residents rooms and deliver laundry would know residents. Some dietary staff would know residents. Recreation and social work certainly.

Q You had mentioned to my earlier question about whether there were any problems operating with the type of staffing structure that you had in place at the commencement of the strike. Were there any other problems. You mentioned the problems you had with temporary workers being unfamiliar with the policies and the residents and then also about your staff growing tired of the extended hours. Were there any other problems?

A Yes. There was the cost factor regarding temporary workers.

Q How much did Avery have to pay for a temporary certified nurse assistant?

A Anywhere between \$28 and \$34 an hour.

Q And how much did Avery pay for its maintenance and [1064] housekeepers?

A \$15.45 an hour.

Q The temporaries that filled those positions?

A Yes.

Q And how about dietary workers?

A Same \$15.45 an hour.

Q How about the drivers?

A Probably between \$18 and \$19 an hour.

Q In addition to these costs, were there any other additional salaries or wages that were incurred during the initial weeks of the strike?

A Well because people were working 12 hour shifts, everyone was paid at time and a half over the eight hours.

Q When did Avery -- were you involved in the decision to hire permanent replacements?

A Yes.

Q When did Avery first consider using permanent replacements?

A We did some exploration during the first probably the first week to week and a half of December the first week.

Q Why did you do some -- why did Avery do some exploration. What were you exploring?

A We were exploring whether or not there was a market out here. Whether or not we would be able to actually hire people. It was a tight labor market.

Q Why didn't Avery just decide to try and hire some people and [1065] whatever that number was it was?

A The goal was to have workers who would be able to deliver consistent care and be there for the residents and one or two people wasn't going to make a difference.

Q And how did Avery explore what the market was?

A I asked our Director of Human Resources to talk with someone she had known from the field and explore what the market was with him and whether or not we would be able to hire health care employees and she did that I believe during the first week or so of December.

Q And who was that outside source that was contacted?

A Mr. DeLisa.

Q And was anything ever reported to you about the viability of hiring permanent replacements?

A Yes. There was a plan that was developed. Mr. DeLisa and his staff developed a plan of how they

would go about exploring whether or not there were workers out there and presented us with that plan.

Q At the time you had mentioned the first week of December when Avery was exploring the viability of the market, had Avery made the decision to hire permanents?

A No.

Q When did Avery make that decision?

A Around December 14th or so.

Q And why did Avery decide at that time to hire permanent [1066] replacements?

A First of all to take care of our residents. Second because my staff was growing tired and there was a work force out there that we could hire.

Q Did you have any indication about how long the strike would be occurring at that time?

A The indication was that it was going to go on way past New Years a long period of time and I knew from what my staff was telling me and from what we were dealing with in terms of temporary workers that I would need to make an intervention.

Q What led you to believe that this strike would be occurring well past New Years?

A I believe Mr. Brown made that statement and the meetings that I attended it was very clear that there was no movement being made and my first

concern and my first obligation is to the residents of the facility to insure that they are safe and that their care is good and consequently that's why I made the decision on permanent replacements.

Q Was there ever any discussion that you were involved in that the use of permanents could be used to leverage bargaining with the union?

A No.

Q Who oversaw the process the overall process of hiring permanent replacements?

A I oversaw the total process but I delegated it to my [1067] department heads to do the hiring.

Q And how did Avery go about hiring permanent replacements?

A Well there was a job fair. My department heads also talked to the vendors that we had been using as vendors for temporary replacements whether or not they would be willing to allow us to pay a fee in order to hire employees and they said yes.

MR. QUIGLEY: I'm sorry. I would object. I don't know what the they said yes refers to.

MR. HARRINGTON: I'm sorry.

BY MR. HARRINGTON:

Q Can you be more specific and avoid the use of pronouns.

A Okay.

Q Try and use proper names.

A I asked Gayle McAllister my Director of Plant Ops, Bill Englehart my Director of Dining Services, Susan Harrison the Director of Independent Living and Barbara Brigandi the Director of Nursing Services to contact the temporary agencies to see if they would be willing to for a fee provide us with employees.

Q And was it ever reported to you whether it was possible that fees could be paid to get referrals from these temp agencies?

A Yes, it was reported to me by those individuals.

Q Did Avery hire all of the people who were working on a temporary basis. Did Avery make offers of permanent employment to all of those people?

A To all of the temporary workers no.

[1068] Q Other than hiring some of the temporary workers, were there any other sources of hiring permanent replacements?

A Yes. There were some individuals who knew that we were hiring who were working for our home health agency who were interested in the positions and let us know that they were interested in the position. There was also word of mouth. People told their friends and/or relatives. We contacted some CNA training schools. I know Barbara Brigandi

contacted training schools and they sent over some people.

Q Are those people that would have been new graduates?

A Yes.

Q In the process of hiring permanent replacements, did Avery identify itself as the employer of these permanent replacements?

A I'm not sure what you mean.

Q Did Avery ever run - in its recruitment of permanent replacements did it run public ads in which it identified itself as seeking permanent replacements?

A No, we didn't.

Q And why did - why was the decision made not to identify Avery?

A There had been a number of incidents of violence and threatening behavior that had occurred both on the picket line and outside of the facility.

Q Dr. Parker, let me stop you there. Prior to mid-December when the decision was made to hire permanent replacements, what [1069] acts of violence were reported to you?

A Okay. The acts of violence that were reported to me by that time were rocks thrown at vehicles, eggs thrown at our vans and also thrown at a temporary

employee at a nurse a temporary nurse in a commuter parking lot. One of my social workers who was working as a driver was spit at in the face by a union organizer. One of my supervisors while she was waiting to exit was told by a union organizer I know where you live. I've seen your daughter. I know what time she gets there. It was essentially a threat to her daughter. Tires were slashed. Vendors tires were slashed.

Q How about with respect to – are you familiar with Star Med?

A Yes, I am.

Q And prior to mid-December are you aware of were any acts of violence reported to you that involved Star Med?

A Yes. On – Susan Fagan from Star Med told me that a group of about –

MR. J. CREANE: Objection Your Honor. This is again hearsay.

JUDGE MARCIONESE: I assume that you're not offering it for the truth.

MR. HARRINGTON: No. I'm offering it specifically for Dr. Parker's state of mind and why she –

JUDGE MARCIONESE: Didn't run newspaper ads identifying the Respondent as the Employer. All right. I'll receive it for that purpose but not for the truth.

MR. QUIGLEY: I think Judge we still need some foundation as [1070] to when these things occurred.

JUDGE MARCIONESE: Okay.

MR. QUIGLEY: The ads were not being run —

JUDGE MARCIONESE: I thought Mr. Harrington initially asked before the first two weeks of December or within the first two weeks of December.

MR. HARRINGTON: Right. Prior to hiring permanents which Dr. Parker testified was December 14th or 15th.

JUDGE MARCIONESE: Before December 14th is what you were asking?

MR. HARRINGTON: Yes.

JUDGE MARCIONESE: And what you've just told us are these all reports you received in that period of time?

THE WITNESS: Yes.

JUDGE MARCIONESE: All right. Okay. You can answer but make sure that you limit yourself to that period of time.

THE WITNESS: Okay. Yes. There was an incident that occurred on December 9th. A number of union members, strikers and Almena Thompson,

went to the office of Star Med who was one of our providers just totally 40 people in mass went to the office and essentially threatened her and vandalized the office of Star Med.

BY MR. HARRINGTON:

Q And that's what was reported to you?

A Yes.

Q You weren't there.

[1071] A I was not there.

Q Okay. And what did - how was - what did Star Med supply to Avery?

A Star Med supplied CNA's and nurses.

JUDGE MARCIONESE: These are the temporary employees that had been working?

THE WITNESS: Yes. They were one of our providers.

BY MR. HARRINGTON:

Q Did there come a point in time when Avery stopped hiring permanent replacements?

A Yes, there did.

Q And why did Avery stop hiring permanents?

A There was a moratorium agreed to at a January 12th meeting by Tom Cloherty and Norman Harper with Jerry Brown.

Q Okay. And at the time that Avery agreed to stop hiring permanents, had Avery filled all of its vacancies?

A No.

Q And at that time that Avery agreed to this moratorium, were there any applications that were not acted upon?

A Yes.

Q And to date how many striking employees have been recalled to Avery?

A I think 78 or 79.

MR. HARRINGTON: If I could just have one minute.

JUDGE MARCIONESE: Let's go off the record.

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**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

**CHURCH HONES INC.
d/b/a Avery Heights**

Respondent,

and

**NEW ENGLAND HEALTH
CARE EMPLOYEES UNION,
DISTRICT 1199, AFL-CIO**

Charging Party

Case No.

34-CA-9168

The above entitled matter came on for further hearing pursuant to adjournment, before Hon. Michael Marcionese, Administrative Law Judge, at 280 Trumbull Street, Hartford, Connecticut, on Tuesday, March 27, 2001 at 10:00 a.m.

* * *

[1143] Then I had to think about how I was going to deal with the situation and I would say that that occurred around the first week of December.

Q You say it was conveyed to you that the strike was going to go on much longer than the last strike?

A Right.

Q And how exactly was that conveyed to you?

A I'm not sure when I heard it the first time. I may have heard it either directly from Jerome Brown that the strike is going to go on longer or I may have heard it from Mr. Cloherty. I'm not sure but I know I was informed probably as we got through the first two weeks of the strike that this strike was different that this was going to go on a long time.

Q Did you hear that as a result of the December 15th meeting between Mr. Brown and Mr. Harper?

A No.

Q So you're basing your answer upon what you heard from your attorney and possibly what you heard from Mr. Brown's own words?

A Yes in negotiations and I can't remember exactly when but it was clear to me that this strike was not going to be a four week strike like the last time. That was the communication I got. I can't tell you exactly when but I know that I became concerned about it during the first week of December.

Q Did you speak to Mr. Brown during that first week of December?

* * *

[1164] Q Okay.

A I didn't know Susan Fagan until December.

Q When you found out about the horrors at her shop?

A Yes.

Q And did you know how long the relationship had been with the Home between her company and yours?

A I know there was a contract that was signed in May because I reviewed it but Nursing usually takes care of a number of their dealings with pools to fill in so I wouldn't be directly involved with it.

Q And the time sheets that the employees bring into – that the temp employees bring into you to sign contain a provision stating that if the employee is taken by the home as an employee they will pay a liquidation fee; is that fair to say?

A I believe that's true.

Q In Star Med's case it was about \$1,200 negotiable beginning at \$1,200?

A I saw that time sheet for the first time a few weeks ago yes that's true.

Q And do you happen to know out of the 20 or so CNA's that were provided by Miss Fagan to your home during the course of the strike and I'm talking about just the period from November 17th to when the union called off the strike on January 20th. In that two month period do you happen to know how many CNA's were actually converted. How many of her CNA's became Church Homes

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[1193] around to confirming that on December 8th and cutting a check on that date?

A My memory is that it occurred during the first week of December.

Q That what occurred during the first week of December?

A That - I asked Suzanne DeCourcy during the first week of December to consult with whoever she knew to see if there was a market out there. That's what I remember.

Q What are you going by just strictly by your memory?

A By my memory yes.

Q Do you have any notes or calendar that would confirm that?

A So these are actually his billing documents to the home that show work the week ending December 1st and his testimony that he would not or did not begin billing the home until sometime a week to 10 days after he had first been called and had presented a proposal to the home.

MR. HARRINGTON: I'm going to object. I think we actually had testimony from Mr. DeLisa about what exactly these dates were because if I remember correctly December 1st was not a Friday. It was like a Wednesday I want to say.

JUDGE MARCIONESE: That's what I have.

MR. HARRINGTON: And so there was some testimony that he might have actually been indicating the exact date. So I think the testimony of Mr. DeLisa is being mischaracterized.

JUDGE MARCIONESE: Well all right. That's the problem when

* * *

[1196] Q Now moving to the early part of December 1999 the – what individuals were involved in making the decision to hire permanent replacements at Avery Heights yourself; is that correct?

A Are you talking about the decision?

Q The decision to hire permanent replacements. That would be yourself; correct?

A Yes.

Q Was Mr. Harper involved?

A Yes.

Q Anyone else?

A There may have been a consultant with the financial people. I'm not sure.

Q Well take your time and think. Who was the consultant, if any?

A A consult. It probably was the chief financial officer.

Q And who is that?

A Ray Gasparini.

Q Ray Gasparini. And who first broached the subject of hiring among the three of you of hiring permanent replacements at Avery Heights during the strike?

A I did.

Q And do you recall when you first raised that?

A When I was concerned about the work force.

Q And when was that?

* * *

[1198] Q. Were all of the temporary employees working 12 hour shifts?

A A number of them were.

Q And was that optional with them on whether they wanted to work the 12 hour shift?

A No. It's whatever the department had discussed with the temp agency.

Q Was there any limit placed on you in terms of the number of temporary employees that the home could hire in order to so that people wouldn't be burnt out. Why didn't you hire more temporary employees?

A It wasn't the way to achieve good continuity of care by having different people come in all the time.

Q Well okay. So the burn out wasn't – so the two factors really come down to cost and continuity of care?

A No. I had a staff that was tired and worried about the holiday season.

Q But that could be alleviated by hiring more temporary employees; correct?

A Which would not lend to continuity of care.

Q I understand. So the burn out factor is really related or could have been alleviated but for the continuity of care concern that you say you had?

A I don't know if that could have alleviated a burn out or worry factor regarding the holiday season.

Q Well you operated during the '95 strike without hiring [1199] permanent replacements; correct?

A Correct.

Q And your sister agency Miller 15 or 20 miles away operated for the entire duration of the strike more than two months from '99 to January of 2000 November of '99 without hiring permanent replacements; correct?

A Correct.

Q And your sister agency Miller 15 or 20 miles away operated for the entire duration of the strike

more than two months from '99 to January of 2000 November of '99 without hiring permanent replacements; correct?

A Yes.

Q Did you discuss with the administrator at Miller how they were dealing with the burn out problem?

A No.

Q You never discussed it with them?

A No.

Q Did you discuss – so it's your testimony that a sister nursing home also operated by Church Homes was going through a strike by the same union at exactly the same time that you never discussed with the administrator there how they were dealing with the strike?

A That's correct.

Q And why would that be.

A Because I was too busy with my own strike.

Q Too busy to pick up the phone and say how are you doing down there with your volunteers and temporary work force how are you doing it?

A Correct I didn't do that.

Q Too busy to pick up the phone and do that?

[1200] A I didn't do it.

Q Now in terms of is it fair to say that Avery Heights had a more difficult time finding both temporary and permanent replacements for the CNA's than it did for the other service and maintenance jobs?

A Yes.

Q In fact, most of the call backs for after the January 20th offer to return to work by the union the majority of the call backs of strikers have been in the CNA positions haven't they?

A Yes.

Q Pardon.

A Yes.

Q How many dietary employees have been called back?

A In the Heights I would say all of the cooks although not all accepted all of the hours. Almost all of the waitresses. One of the dishwashers and in the Healthcare Center one cook although two others have been recalled and they rejected it.

Q Were they recalled to the same number of hours that they worked prior to the strike?

A They were recalled to the same number of hours.

Q And how about in housekeeping. How many striking housekeepers have been called back to work?

A None.

Q Out of how many?

A Out of 16 or 17.

[1201] Q And in the case of the CNA's, the home was paying premium was it not for temporary CNA's that it hired both either temporarily or as permanent positions strike the permanent. When you recruited for temporary CNA's to fill in for the striking CNA's, you paid a premium rate did you not from various temp agencies?

A I believe there was a premium.

Q And for the other classifications dietary, housekeeping, laundry and drivers the rate that you paid was somewhere in the neighborhood of \$15 an hour or \$15.45 an hour; is that correct?

A Yes.

Q And it's your testimony that replacing all of those non-CNA employees striking employees that that was motivated by cost considerations that it was costing too much to pay for the temporary employees in those classifications?

A What I said was it was motivated by and I'll say it again it was motivated by the need to have continuity of care and that meant both for hands on care and for people who worked around the nursing units and throughout the facility and in the Heights that we needed to have a housekeeping staff that was stable so that my receptionists and my clerical staff and my social workers didn't have to clean rooms. I

needed to have people who I would work in the laundry and do personal laundry so the bookkeepers didn't have to do personal laundry. I needed to have people who would work in the dietary department so all of those [1202] people who worked in the dietary department of my staff could go back to doing their regular jobs.

Q But those concerns could have been addressed by hiring either temporary or permanent employees.

A I needed a consistent work force not a temporary work force. Not a work force that I would have to orient practically daily with a two to two and a half hour orientation. I needed to be able to sure that the people who were coming in would be people that we would entrust all of these services to.

Q Well entrust what the housekeeping?

A Yes because they have to be trustworthy. They go into resident rooms. In the Heights the same thing.

Q But those concerns they weren't any different in '99 than they were in '95 were they?

A What was different in '99 than in '95 is that all along we had been told that there was no movement and that this strike was going to be a long strike particularly starting the first week of December and if felt that I needed to take action because I saw no movement and I needed to have continuity of care.

Q Do you think you saw movement on your side from the management side in negotiations?

A Yes. I believe we moved and I was there. I believe we made at least four to five offers. We also moved in the Mayor's office up to 20 percent on the benefit fund.

Q The Mayor's office was long after you had already replaced [1203] almost all of the work force and hired a new work force so let's leave the Mayor's office out of this..

A We had moved every step of the way. I saw movement.

Q You did. You were there when you increased your offer by a nickel five cents an hour. You were there to witness that movement?

A Yes.

Q Okay. And you were there to witness the movement after a number of sessions on a proposal from a seven year contract to a six year contract?

A Yes.

Q And those mark a significant movement in your opinion?

A When nothing else was moving from the union's side.

Q Didn't the union match your nickel offer by saying you want to do it by nickels we will drop ours

by a nickel. They did that didn't they. You were there for that; right?

A Yes.

Q So most of the job classifications that you eventually displaced strikers for the housekeeping, dietary, laundry the non-CNA positions those are all non-direct patient care positions; correct?

A You call it non-direct patient care. I call it non-hands on care. They all have contact with residents. They have contact in the Heights with residents. They have contact in most of the facility with residents.

[1204] Q They have contact but that's why I asked you earlier in this questioning if you understood the term direct care positions and you said yes and you said that would be the CNA's.

A I said - I asked you hands on care which meant laying hands on a patient and I asked you that question.

Q So your position is that it's a form of patient care direct patient care for the person to come in and empty the waste basket in a patients room. That's your - that meets your definition of direct patient care?

A Direct contact with the patient yes.

Q Direct contact. I understand there's contact between dietary, housekeeping and maybe even laundry on occasion with patients but that's contact

occasional contact. That's not hands on direct patient care; correct?

A It's not hands on care but it's daily contact. Our residents have housekeepers come into their rooms on a daily basis. They have to know them and trust them. That's what makes Avery different than other places. We really believe in building of relationships.

Q Now when you made the decision to hire a new work force sometime in early December by the 14th of December, you were -- you would have welcomed back the strikers rather than going the route of hiring permanent replacements wouldn't you?

A I don't understand the question.

Q You would have preferred that the strike end and that the [1205] workers, the striking workers, return to their jobs. Would you have preferred that to going out and hiring a new work force?

A Sure.

Q Okay. And that would have taken care of a lot of problems.

A Then the strike would have been over.

Q That would have ended a lot of your problems. They were already oriented. They were already trained. They already had close relationships with the patients; correct?

A Yes.

Q Okay. You weren't trying to just weren't attracted by the idea of starting fresh with a new work force were you?

A No.

Q Did that have any appeal to you?

A No.

Q No appeal okay. So when you made the decision to hire permanent replacements, why did you not tell the strikers that their jobs were in jeopardy and either the union or individual strikers could return to their jobs and reclaim them before they were permanently replaced. Why didn't you do that?

A It appeared to me that that was not the route the union was going and I think I answered the question about why I didn't or maybe I didn't inform the union that we were hiring permanent replacements because I was really worried about the potential for violent actions which had already occurred.

Q But individuals might have – any number of them might have [1206] decided if you told them that their jobs were at stake regardless of what the union did that they were going to come back to work and reclaim their jobs before they were permanently replaced; right?

A Could you repeat the question.

Q Regardless of what the union did as an organization with the information that you were

going to begin hiring permanent replacements, individual strikers were free to come across and return to their jobs if you had told them that their jobs were at stake and that they had better get back to work or they were going to be permanently replaced.

A Individuals strikers were always free to come back to work. Always free.

Q But they didn't know that their jobs were going to be permanently replaced before you did it did they?

MR. HARRINGTON: I would object to the tone and to the argument. She's answered the question.

MR. J. CREANE: Well the argument -

JUDGE MARCIONESE: It is a different question which I think the Charging Party is entitled to an answer to but if you could just try to tone it down a bit. What was your question again.

MR. J. CREANE: Yes, Your Honor.

BY MR. J. CREANE:

Q You weren't locking the employees out; correct at any point in December in December of 1999?

[1207]A No.

Q Okay. Some employees had crossed - bargaining unit employees had crossed the picket line either

from the outset or shortly after the picket lines were established did they not?

A Yes.

Q And they reported to work, pardon?

A Yes.

Q And about how many were there. Somewhere around 10 or so?

A Maybe.

Q Okay. And my question was regardless of what the union did as an organization with the information that you were about to begin hiring permanent replacements, individual strikers might very well have any number and we can only speculate might very well have decided to abandon the strike, cross the picket line and return to work if they had known that they were going to be permanently replaced by the home; isn't that correct?

A Are you saying it's a possibility. I say it's a possibility.

Q Then why didn't you tell both the union and the individuals strikers that they were about to be permanently replaced by the home if you wanted them back?

MR. HARRINGTON. I would object. That question has been asked and answered.

MR. HARRINGTON: I didn't get an answer. I got an evasive response that was not responsive Your Honor.

[1208] JUDGE MARCIONESE: All right. You can then argue that I should not credit the explanation but do you have any – at this point in time sitting here today do you recall any reasoning behind not informing the union at that time of your plans?

THE WITNESS: Only because of the potential for violence and threatening actions.

JUDGE MARCIONESE: That's the only reason you can recall at this point?

THE WITNESS: Well that's why we didn't inform them.

BY MR. J. CREANE:

Q And that didn't apply to individual strikers. If they had known, they could have made their own decision on whether to return or not; correct?

A Individual strikers could always make their own decision to return.

Q Yes and do you think that they are entitled to vital information like the fact that the employer is about to permanently replace them so that they can make an informed decision on whether to return to work or not?

A No.

Q Not in your view?

A No.

Q Okay. And the picket line you made some illusions to some incidents on the picket line about something about eggs and rocks. Were those picket line incidents that were eluding to?

[1209] A Some were picket line incidents. Some were commuter lot incidents. Some incidents such as a woman's gas tank being filled with sugar and car engine or top being painted red those occurred at residences. So the incidents occurred in the picket line, in the commuter lot, at peoples homes, people being followed from work to their homes, people being followed from their homes to work. There were a variety of incidents of threatening behavior.

Q And how many of those incidents were reported to the police?

A A lot of them. Many of them.

Q And how many arrests resulted from the complaints that were filed with the police?

A I believe there was one arrest of violence with one of our vendors that was reported to the police and an arrest was made.

Q One arrest. One arrest.

A Yes.

Q That's all that you can recall?

A Yes.

Q And with respect to your rationale that somehow there would be more incidents on the picket line, is that what you concern was that there would be more of such incidents if you had told the union and the strikers that the workers were all about to be permanently replaced. You said that you feared some increase in such incidents; is that correct?

[1210] A I was also – yes.

Q And how would the fact of concealing it from the union and the employees, the strikers, and then presenting them with fate accompli how would that change the likelihood of such incidents occurring on the picket line. Wouldn't the permanent replacements still have to come through the picket line?

A They would

Q Wouldn't the workers be even more angry because the home hadn't told them that they had been permanently replaced. Wouldn't that make them even angrier?

A Yes.

Q So what possible – how can you explain why what you claim is fear of an increase of incidents on the picket line how is that related to – how would that have been avoided by hiring permanent replacements?

A Excuse me.

Q How would that have been avoided your concern about an increase in disruptive incidents on the picket line.

A And disruptive incidents to the potential permanent replacements too towards them.

Q Whatever. At some point you understood that it was going to be known that you had replaced much of your work force with permanent replacements. You didn't expect to keep that as secret forever did you?

A No.

[1211] Q So how would having gone ahead and hired permanent replacements and not having told the union and the strikers how would that have reduced the likelihood of these incidents that you said you feared if you told the union and the strikers that you were about to hire permanent replacements?

A I don't really understand what you're asking me. Could you just be a little bit more explicit or concise.

Q If you need more time to think about it just ask me.

A No. I need to know what it is specifically that you're asking me.

Q You say that you made your decisions to hire permanent replacements based on a couple of factors. One was cost and we haven't gotten to that one yet. Another was continuity of care and the third was which is probably a sub-set of the first two is burn

out. You could have avoided burn out by hiring more temporaries but that might have increased -

JUDGE MARCIONESE: It would be easier if you just asked a question.

MR. J. CREANE: Okay.

BY MR. J. CREANE:

Q So those were the reasons as I understand it on why you and Harper and Ray decided to hire permanent replacements and then as a separate decision should we tell the union about it or not you say we made that decision not to tell the strikers or the union because we were concerned that there might be an increase [1212] in the number of these incidents that you alluded to on the picket line and away from the picket line; correct?

A And it also may have discouraged people from coming through from being a permanent replacement.

Q But weren't they going to have to come through the picket line whether as temporary or as permanent and as known permanent in the Employers view at some point anyway?

A But why increase it at the time of hiring.

Q What do you mean?

A Why would I risk increasing the level of violence at the time that I was trying to have people come to the facility, be interviewed and be hired.

Q So that's pure conjecture on your part; correct?

A Well that's what I was thinking.

Q But it's conjecture as to what might happen out on the picket line; correct?

MR. HARRINGTON: I would object. He's asking for her opinion. She's offering it and now for some reason he's not accepting the answer to the question that he posed.

JUDGE MARCIONESE: All right.

MR. J. CREANE: But that's conjecture on your part on what might have -

JUDGE MARCIONESE: But even if it is, does that mean that her statement - that that is what she was thinking at the time. Any time you make a plan and you think about what might happen

* * *

[1249] A Yes.

Q And in that strike or about the time of the 1995 strike did you come to know Jerry Brown?

A Yes.

Q Had you known Mr. Brown before the time of the 1995 strike?

A No.

Q Directing your attention to the – strike that. Now by late November, 1999 there were strikes at both Miller and Avery; is that correct?

A Yes.

Q And who was responsible for the operations at Avery?

A Dr. Miriam Parker.

Q And what about the operations at Miller. Who was responsible or those?

A Sister Ann Noonan.

Q And they both reported to you?

A Yes.

Q Now at some point did the issue of permanent replacements come up?

A Yes.

Q And do you know when it was first seriously considered?

A It's a little different question than did the subject of permanent replacements come up. It came up earlier much earlier than when it was seriously considered.

Q When was it first seriously considered?

* * *

[1283] A Yes.

Q And what was your – why did you authorize this policy or this decision not to disclose it to the union or the striking employees?

A My objective was to get a stability to the organization by having a critical mass of many employees and –

Q Many permanent replacements?

A Yes permanent replacements and I judged that with the activity at the picket line and with scab signs and some of the intimidations that we would have a better chance of getting our critical mass up to 100 people.

Q And your reasons for deciding to hire the permanent replacements I believe you said was concern about the patients?

A My vision that patient care could conceivably suffer in the future if we continued with the same model that we have temporaries, volunteers many of which were over 80 and the nurses working 12 hours.

Q Well wouldn't the – did you think about or consider letting the union or the strikers know that you were thinking about permanent replacements and tell them that unless they came back to their jobs that they would – you felt that you had no choice but to permanently replace them. Did you give that any consideration?

A No.

Q Why not?

[1284] A I didn't see it as a negotiating lever. My only focus was on the quality of services going forward in the future.

Q But wouldn't getting the workers back who had knew the patients best and had been trained and oriented. Wasn't that the best possible solution to your concerns about the patients?

A I was of the view that Mr. Brown wasn't going to let his workers back for a long period of time.

Q But he didn't - you never had a chance to think about what the affect of your threatening to replace everybody's - replacing everybody on their job. You never told them that. So how do you - were you assuming that he would react a certain way if you told him?

A Sir, it never entered my mind to use it as a threat to Mr. Brown.

Q Or to let the striking employees know on an individual basis that they were going to be replaced if they didn't come back to their jobs immediately?

A No.

Q But wouldn't that have been the best for the patients to have the people or the workers that knew them that were trained long term employees of Avery Heights. Wouldn't that have been the best solution for your concerns about the patients?

A It would have been a fine solution to have the workers come in. We had no particular problems with

the workers. At that time I was just concerned that the strike was going to go on too [1285] long.

Q But you never – couldn't you have shortened the strike – couldn't you have shortened the strike possibly by saying either get back to your jobs by Monday or we're going to start permanently replacing you?

MR. MURRAY: Objection. This has been asked and answered I believe a couple of times.

MR. J. CREANE: It hasn't. Not with this witness.

JUDGE MARCIONESE: I'm not sure from this witness yet but do you want the question repeated?

THE WITNESS: Please repeat it.

MR. J. CREANE: Okay.

BY MR. J. CREANE:

Q You weren't trying to lock the employees out were you?

A No.

Q And you weren't simply trying deciding that you liked the idea of having a new work force better than the old one?

A No.

Q And you would agree that the best solution for the patients would be to have the employees that they were familiar with and had worked with who had worked with them and helped them for years to have that work force back inside the home?

A Yes.

Q Then tell me sir why you did not let the strikers or the union know that their jobs were going to be permanently replaced [1286] unless they returned by X date. Why didn't you do that?

A Like I said previously I just didn't see it as an option for leverage in negotiating.

Q We're not talking about leverage. You're talking about replacing people all of your long term employees have lost their jobs because of your decision to permanently replace them. What are you talking about that you didn't want to use it as leverage in collective bargaining.

MR. MURRAY: I would object to that question.

JUDGE MARCIONESE: That is arguing. I mean he's given you his reason. Whether you agree with it or not or find it credible or not is another story but he has given you his reason.

MR. J. CREANE: All right.

BY MR. J. CREANE:

Q Forget about it as leverage. You're saying that you didn't want to use it as leverage in collective bargaining. Did it occur to you or did you think about the fact that perhaps you had some obligation to all of these long term employees who were on strike before you replaced them with these new people that you wanted to hire for their jobs. Did that occur to you at all that consideration?

A Yes, it did.

Q Then why didn't you tell or give them an opportunity to return to their jobs and keep them before you permanently replaced them?

* * *

No. 08-1211

Supreme Court, U.S.
FILED

AUG 13 2009

OFFICE OF THE CLERK

In the Supreme Court of the United States

CHURCH HOMES, INC., DBA AVERY HEIGHTS,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that petitioner violated the National Labor Relations Act by refusing to reinstate striking employees for whom petitioner had secretly hired permanent replacements.



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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted in 303 Fed. Appx. 998. The earlier decision of the court of appeals remanding the case to the National Labor Relations Board (Pet. App. 24-42) is reported at 448 F.3d 189. The decision of the Board on remand (Pet. App. 6-23) is reported at 350 N.L.R.B. 214. The initial decision of the Board and the decision of the administrative law judge (Pet. App. 43-190) are reported at 343 N.L.R.B. 1301.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2008. The petition for a writ of certiorari was filed on March 31, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (Act) makes it an unfair labor practice to “discriminat[e] in regard to hire” to “discourage membership in any labor organization.” 29 U.S.C. 158(a)(3). An employer commits such an unfair labor practice by failing to reinstate striking employees immediately upon their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for its conduct. *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967). The employer establishes such a business justification when it shows that it has filled the positions formerly occupied by the strikers with permanent replacements in order to “protect and continue [its] business.” *NLRB v. Mackay Radio & Tele. Co.*, 304 U.S. 333, 345 (1938). The employer, however, may not hire permanent replacements if motivated to do so by “an independent unlawful purpose.” *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964).

2. Petitioner operates a nursing home and assisted living facility, Avery Heights (Avery), in Hartford, Connecticut. Since the early 1970s, New England Health Care Employees Union, District 1199, SEIU, AFL-CIO (Union), has represented the approximately 185 service and maintenance employees at Avery. Pet. App. 27, 106-107.

On October 31, 1999, a collective-bargaining agreement between petitioner and the Union expired. Negoti-

ations for a new agreement were not initially successful, and the Union struck the Avery facility on November 17, 1999. Nearly all of the bargaining unit employees participated in the strike. Petitioner continued to operate the facility using supervisory personnel and temporary replacements. Pet. App. 26, 45, 59, 107, 111-112, 144.

On about December 15, 1999, petitioner began hiring permanent replacements for the striking employees. Pet. App. 26, 59, 144. Petitioner did not give the Union or the striking employees advance notice, nor did it inform them when it actually began the hiring. In fact, petitioner took pains to keep the hiring of permanent replacements a secret. Among other things, petitioner did not identify itself in employment ads it ran, and it informed an employment agency that its plans were to be kept "hush-hush," so that as many permanent replacements as possible could be hired before the Union found out. On December 31, 1999, Avery's CEO sent his board of directors a confidential memorandum informing them that petitioner had begun to hire permanent replacements in a "well-executed surprise event. * * * We have [the Union] in a real bind at Avery." *Id.* at 37, 60 (brackets in original); see *id.* at 26-27, 38, 145-147. The memorandum did not link the secrecy to any concern about union interference with the hiring process, which later became petitioner's purported justification for it. *Id.* at 177-180.

By late December of 1999, the Union suspected that petitioner had begun hiring permanent replacements for the striking employees. Pet. App. 26-27, 152-153. On January 3, 2000, at a bargaining session with petitioner and a federal mediator, the Union asked petitioner whether it had hired permanent replacements. Petitioner acknowledged that it had. *Id.* at 27, 60, 155.

Two days later, the Union made an offer on behalf of the striking employees to return to work. Pet. App. 27; see *id.* at 65, 156. Petitioner replied that it had permanently replaced over 100 of the strikers. Petitioner also questioned whether the Union's offer was unconditional, but stated that it would reinstate the strikers in accordance with its legal obligations. *Id.* at 27, 156-157.

On January 12, 2000, petitioner and the Union met with the mayor of Hartford. The mayor asked petitioner if it would agree to a 10-day moratorium on the hiring of additional permanent replacements. Petitioner agreed, but said that it would not discharge any of the permanent replacements it had already hired to make room for returning strikers. Pet. App. 16-17, 41 n.7, 104 n.1, 158-159.

On January 20, 2000, the Union renewed its offer to return to work, expressly making it unconditional. Pet. App. 27, 159. Afterwards, petitioner began recalling strikers to positions that had not been filled by permanent replacements, ultimately reinstating about 79 of them. *Id.* at 27, 159, 174.

3. a. Acting in response to charges filed by the Union, the National Labor Relations Board's General Counsel issued an unfair labor practice complaint alleging, *inter alia*, that petitioner violated the Act by refusing to reinstate the strikers upon their unconditional offer to return to work. Pet. App. 104-105, 168. After a hearing, an administrative law judge (ALJ) sustained the allegation. *Id.* at 43-44, 180-181. The ALJ found that the General Counsel established that petitioner had an "independent unlawful motive" for hiring the permanent replacements for the strikers. *Id.* at 180-181. In so finding, he rejected petitioner's arguments that it feared that the Union would have interfered with the

hiring of permanent replacements if it had known of petitioner's intent to do so, or that petitioner had some other good-faith basis for declining to inform the Union. *Id.* at 175-180. Rather, based on the evidence that petitioner sought to "replace a majority of the unit before the Union found out," the ALJ found that petitioner's motive was to "punish the employees for showing their support for the Union" and to "break the Union's solidarity." *Id.* at 178-181.

b. The National Labor Relations Board (Board) voting 2-1, reversed the ALJ and dismissed the allegation. Pet. App. 43-45, 71. The majority found that petitioner's failure to disclose its hiring of permanent replacements was not evidence of an unlawful motive, because petitioner had no obligation to make that disclosure. *Id.* at 63-64. The majority further found that the secret hiring of permanent replacements was simply petitioner's "economic counter-weapon, deployed with the lawful intended effect of forcing the strikers and their Union to yield." *Id.* at 68-71.

The dissenting member found that petitioner's conduct was not "economically motivated," that the reasons it advanced for hiring permanent replacements in secret were pretextual, and that it acted with an independent motive of undermining the Union. Pet. App. 93-99. The dissenting member rejected the majority's "economic counter-weapon" theory, on the ground that petitioner gained no bargaining advantage by engaging in hiring that was kept secret from the employees and the Union. *Id.* at 99-101.

c. The Union filed a petition for review in the court of appeals. The court of appeals vacated the Board's decision and remanded the case to the Board for further consideration. Pet. App. 24-25, 41-42.

The court of appeals "accept[ed] the Board's premise that an employer has no legal obligation to inform striking workers before hiring permanent replacements." Pet. App. 38. Nevertheless, the court determined that in this case, the Board failed to take account of petitioner's secrecy:

[L]ogic suggests that an employer seeking to enhance its bargaining leverage * * * would have every incentive to publicize the [hiring of permanent replacements]. * * * Conversely, it would appear that employers with an illicit motive to break a union have a strong incentive to keep the ongoing hiring of permanent replacements secret. The replacement of over half of a unionized workforce with nonunion workers would devastate the union's power and credibility. An employer seeking to land such a blow cannot simply announce the hiring of large numbers of replacements. * * * [A]n employer seeking to punish strikers and break a union therefore needs enough time to establish an employment relationship with a large number of permanent replacements before the union can react by offering to return to work, and will therefore have a strong incentive to keep the replacement program secret for as long as possible.

Id. at 39-40.

The court of appeals acknowledged that there may be "legitimate explanations for secrecy," but observed that the Board "made recourse to none." Pet. App. 38-39. The court concluded that the Board had "failed to acknowledge the natural and logical implications of the facts it credited and the analytic framework it adopted." *Id.* at 41. Accordingly, the court of appeals remanded

the case to the Board. The court expressly stated that nothing in its opinion "preclude[d] the Board on remand from reaching th[e] same conclusion through adequate reasoning." *Id.* at 41. More specifically the court noted the presence of additional evidence cited by petitioner that "might suggest" that it did not possess an independent unlawful motive, and commented that the Board could decline to accept the ALJ's credibility findings, provided the record supported such a reversal. *Id.* at 41 n.7.

d. On remand, the Board found that petitioner violated the Act by failing to reinstate all of the strikers upon their unconditional offer to return. Pet. App. 6-22. The Board recognized, as law of the case, the finding of the court of appeals that "the logical implication of [petitioner's] secrecy was an illicit motive," and found that the record evidence, including the facts highlighted by the court, was "insufficient to refute the inferred unlawful motive." *Id.* at 12-13.¹

The Board expressly affirmed the ALJ's credibility-based rejection of the testimony of one of petitioner's officials that petitioner had hired permanent replacements covertly because it feared interference by the Union. Pet. App. 14-15. The Board observed that, not only was there no corroborating evidence for the testimony, but that other evidence, including petitioner's confidential December 31, 1999 memorandum, cast doubt on it. That memorandum described in detail the covert hiring of

¹ Two Board members stated their belief that the court of appeals, by drawing an inference of illicit motivation from the secret hiring of replacements, improperly shifted the burden of proof from the General Counsel to petitioner. Pet. App. 12 n.6. The third Board member, expressing agreement with the court of appeals, stated that petitioner's deliberate secrecy was probative of its motive. *Ibid.*

permanent replacements, but made "no mention of [petitioner's] claimed fear of violence." *Id.* at 15. The Board also noted petitioner's failure to give any such explanation to the hiring agency through whom it sought to hire replacements, notwithstanding its instruction that the agency keep its activity "hush-hush." *Ibid.* Observing that it had "affirmed this credibility determination in the underlying decision," the Board stated that, "having carefully reviewed the record [again] we reaffirm that finding as consistent with the record as a whole." *Id.* at 14-15.

The Board also reviewed petitioner's other claims of its good faith and found them wanting. First, the Board rejected petitioner's argument that its "lawful conduct at the bargaining table" showed that it lacked an unlawful motive when it covertly hired permanent replacements. The Board observed that there is no support in the law for petitioner's "suggestion that because it did not violate its duty to bargain * * *, its unexplained secret hiring of permanent replacements could not have violated [the Act]." Pet. App. 16. Second, the Board declined to give weight to petitioner's agreement to the 10-day moratorium on additional hiring, given that petitioner "had already permanently replaced more than half the bargaining unit" at the time of the agreement. *Id.* at 16-17. Third, and for the same reason, the Board rejected petitioner's argument that its "lawful behavior with respect to the recall," once the Union had learned of the covert hiring and made an unconditional offer to return to work, established that the hiring was lawfully motivated. *Id.* at 17.

Having found that the evidence failed to establish a lawful motive for its secret hiring of permanent replacements, the Board ordered petitioner to offer reinstatement.

ment and backpay to the employees whom petitioner had permanently replaced. Pet. App. 17-19.

e. Petitioner then filed a petition for review of the Board's supplemental decision, and the General Counsel filed a cross-application for enforcement. The court of appeals denied the petition for review and enforced the Board's order. Pet. App. 1-5. The court found that, on remand, "[t]he Board appropriately recognized that the logical inference to be drawn from [petitioner's] secrecy, absent evidence of a legitimate purpose or credible explanation for the secrecy, was that [petitioner] intentionally concealed its hiring of permanent replacements to remove Union members from its workforce and thereby break up the Union." *Id.* at 4. The court further found that "[t]he Board reasonably determined that neither [petitioner's] assertion of good faith in bargaining nor its actions subsequent to the secret hiring of replacements effectively rebutted the inference" of unlawful motive "under the circumstances." *Ibid.* The court also expressly upheld the Board's rejection of petitioner's factual assertion that fear of union interference was the reason for its secrecy. The court affirmed the Board's determination not to credit the testimonial support for that claim, noting in particular that the December 31, 1999 memorandum undercut the fear of violence rationale. *Ibid.*

Finally, the court of appeals expressly rejected petitioner's argument that, by complying with the remand, "the Board improperly shifted the burden of proof onto it." Pet. App. 4. The court stated that the Board had "correctly placed the burden of proving a violation of the Act on the [Board's] General Counsel." *Id.* at 5. The court explained that "the General Counsel sustained his burden * * * by putting forth evidence of [petitioner's]

secrecy, which, when inadequately rebutted by [petitioner], supported an inference of independent unlawful purpose. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore unwarranted.

1. This case does not merit review because petitioner makes no claim that the decision of the court of appeals conflicts with any decision of this Court or of another court of appeals. Indeed, petitioner acknowledges (Pet. 15) that this is a case of first impression. Petitioner cites no previous case, and the Board is unaware of any, presenting the issue of whether an employer who secretly hires permanent replacements had an "independent unlawful purpose" (*Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964)) for the hiring of those replacements. Accordingly, this case presents neither a split of legal authority nor an issue of substantial importance to the administration of the Act.

2. Nor does this case present a dispute over the governing legal principles. Petitioner acknowledges (Pet. 15) that the Board's decision in *Hot Shoppes* states the applicable legal principle and does not challenge it.² Pe-

² Petitioner's citation (Pet. 28) of *Supervalu Inc.*, 347 N.L.R.B. 404 (2006), does not advance its case. In *Supervalu*, the Board applied *Hot Shoppes* but declined to find a violation on facts very different from those in this case. There the employer hired permanent replacements openly, followed its usual hiring practices, and did nothing supporting an inference of unlawful motivation. *Id.* at 419-420. In addition, the employer affirmatively dispelled any such inference by later making interim employment at its other facilities available to the replaced employees. *Id.* at 420.

tioner's primary contention (Pet. 17-21) is that the court of appeals, in its initial decision, and the Board, in complying with that decision, improperly shifted the burden of proving unlawful motive from the General Counsel to petitioner. That argument, which the court of appeals correctly rejected (Pet. App. 4-5), presents no issue warranting review by this Court.

As the court of appeals explained in its second decision, it did not shift the burden to petitioner. Rather, the court found that petitioner's secrecy "supported an *inference* of an independent unlawful purpose through which the General Counsel could carry the burden of proving violation of the Act." Pet. App. 5 (citing *id.* at 38-40 (emphasis added)). In its initial decision, the court explained why an employer's secrecy supported such an inference: logically, any legitimate advantage in bargaining that could accrue from permanent replacement of strikers is dependent upon the striking employees being aware of it, while, conversely, "employers with an illicit motive to break a union have a strong incentive to keep the ongoing hiring of permanent replacements secret." *Id.* at 39.

Further, the court stated in its second decision that the Board reasonably found that the General Counsel sustained his burden of proof by putting forth evidence of petitioner's secrecy, "which, when inadequately rebutted by [petitioner], supported an inference of independent unlawful purpose." Pet. App. 5. Petitioner's disagreement with the court of appeals, therefore, turns not on the appropriate allocation of the burden of proof, but on its disagreement with the court of appeals' finding that the Board reasonably found that the record evidence of petitioner's unlawful motive outweighed the evidence to the contrary. *Id.* at 5, 12-13. That fact-

bound disagreement does not provide a basis for granting review.

In any event, petitioner is not correct in asserting (Pet. 20) that "other than [petitioner's] non-disclosure, there is absolutely *no* evidence that could suggest that [petitioner] hired permanent replacement employees to displace the Union as the bargaining representative." Petitioner overlooks that where, as here, the issue is one of illicit motivation, there is a material difference between mere "non-disclosure" and active concealment. In this context, therefore, it is telling, as the court of appeals observed in both of its decisions (Pet. App. 3-5, 26-27), that petitioner made a "conscious decision" to keep the hiring of permanent replacements a secret, both from the Union and from the employees being replaced, and "took active measures to keep the replacement campaign a secret while hiring as many permanent workers as it could before the Union caught on." *Id.* at 8-9, 26-27. The record evidence of petitioner's active concealment provided ample support for an inference of unlawful motive.

3. Petitioner's additional contentions raise only fact-bound questions that do not warrant further review by this Court. Petitioner argues (Pet. 22-27) that the Board and the court of appeals disregarded the justifications it offered for maintaining secrecy by improperly characterizing as hearsay the testimony of petitioner's administrator, Dr. Miriam Parker, who testified that she kept the hiring secret because she feared the Union would engage in picket line violence or otherwise impede the hiring efforts. Pet. App. 14-15, 159-160. The ALJ, however, discredited Dr. Parker's testimony about this and other allegations not on hearsay grounds, but rather based on demeanor, the absence of corroborating evi-

dence, and record evidence, including documentary evidence, that undercut it. *Id.* at 14-15, 105, 125-128, 177-180. The Board, in each of its decisions, affirmed that credibility determination. *Id.* at 14-15, 49, 61-62. In its second decision, in which it set forth its reasoning in detail, the Board expressly relied on each of the ALJ's reasons for discrediting the testimony, but made no mention of excluding or discounting Dr. Parker's testimony as hearsay. *Id.* at 14-15. The court of appeals, in its second decision, found that substantial evidence supported that credibility resolution. *Id.* at 4. Accordingly, neither the decision of the Board nor the decision of the court of appeals turns on the asserted evidentiary error.³

Petitioner's assertion (Pet. 19-21, 33-34) that the Board and the court of appeals disregarded its evidence of lawful motive equally fails to demonstrate any basis for granting certiorari. Petitioner's real claim is that the Board erred when it considered petitioner's evidence but found it insufficient to negate the inference of an "independent unlawful motive" (Pet. App. 16), and that

³ Petitioner's attempt (Pet. 25) to compare this case to *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998), is wide of the mark. *Allentown* concerned the circumstances under which an employer may poll its employees about support for their incumbent union. *Id.* at 361-363. The Court criticized the Board for applying a standard that ostensibly considered the employer's "good-faith doubt" of the union's majority status, but that in fact considered the objective circumstances of the employees' union support. *Id.* at 372-379. In the present case, petitioner complains (Pet. 24-27) that what was critical was, not whether the Union would engage in interference or violence, but whether Dr. Parker thought it would. Neither the Board nor the court of appeals, however, viewed the question differently. The Board, affirmed by the court of appeals, simply found (Pet. App. 14-15) that Dr. Parker was not telling the truth.

the court of appeals erred in affirming that factual finding (*id.* at 4). Petitioner repeats its factual argument (Pet. 20), for example, that more weight should have been accorded to its agreement to a brief moratorium on additional permanent hiring, once the Union learned of it. But as the Board observed (Pet. App. 16-17), by that time, petitioner had permanently replaced well over half of the bargaining unit employees. In light of the harm already done to the employees and the Union, the Board and the court of appeals reasonably declined to view petitioner's agreement to cease hiring permanent replacements as establishing a lawful motive for its earlier hiring, let alone evidence outweighing credible evidence of petitioner's illicit motive.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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AUGUST 2009